TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]44

JIN FUEY MOY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED JULY 6, 1918.

(26,635)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 549.

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vs.

THE UNITED STATES OF AMERICA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 2, 1919.

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1 Among the rolls, records and judicial proceedings had in the United States District Court of the Western District of Pennsylvania, at No. 89 November Term, 1917, may be found the following words and figures, to-wit:

Docket Entries.

Indictment: 1-20: Violation of Sec. 2 of Harrison Anti Narcotic Act.

THE UNITED STATES

vs.

JIN FUEY MOY.

Nov.	22,	1917.	Petition of U. S. Attorney for leave to present bill or bills of indictment and Order made granting same, filed and entered.
"	23,	"	A True bill.
"	"	"	Indictment filed.
Dec.	10,	"	Motion to Quash filed.
"	"	"	Argument sur Motion to Quash filed.
"	11,	"	Opinion refusing Motion to Quash, filed and entered.
"	17,	"	Defendant pleads not guilty.
"	"	"	The U. S. Attorney similiter issue, etc., and a jury being called came, viz; John C. Brown, John F. Nichol, Edward J. Cox, Edward L. Burchfield, Joseph F. Filtz, John M. Keefer, A. C. Devore, Walter S. Miller, Charles E. Stephens, Chauncey S. Duvall, Leon Watson, and Q. C. McQuiston, twelve good and lawful men who having been duly summoned and returned were balloted for, impanelled and sworn to well and truly try this issued joined.
"	"	"	Trial proceeds, Dec. 18, 19, 20 & 20. Trial proceeds.
"	..	"	Eighteen (18) witnesses sworn on behalf of Plaintiff.
"	..	"	Twenty-nine (29) witnesses sworn on behalf of defendant.
"	24,	"	Plaintiff's Points filed. Defts. Points filed.
"	"	"	The jury retires to deliberate upon their verdict.
"	"	"	The jury having returned and being in the box and called, do say we find "Jin Fuey Moy, #89 Nov. Term, 1917, Guilty under counts #2, 3, 4, 5, 6, 7, 10 and 11. Not Guilty under counts #1, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19 and 20.

Dec.	24, 1917.	Trial memorandum filed at No. 23 May Term, 1917.
"	28, "	Motion in Arrest of Judgment filed by leave of Court.
"	29, "	Exceptions to charge of the Court filed.
Dec.	17, "	Order in re witness John Kappello filed and entered.
"	" "	Temporary commitment for John Kappello issued.
Jan.	.. 1918.	Motion in arrest of judgment, argued. C. A. V.
"	19, "	Opinion filed and entered refusing motion in arrest of judgment.
Feb.	6, "	U. S. Attorney moves for judgment, whereupon the sentence of the Court is that defendant, Jin Fuey Moy, pay a fine to the United States of One Thousand Dollars; that he be imprisoned in the Federal Prison at Atlanta, Georgia, for and during the term of Two Years * * * and that he pay the costs of this prosecution. Sentence filed and entered.

2

Feb.	6, 1918.	Commitment to Federal Prison at Atlanta, Georgia, issued.
"	" "	Commitment returned endorsed not served as defendant appealed to Supreme Court of the United States.
"	" "	Application for Writ of Error, Affidavit, and order filed and entered granting Writ of Error to the Supreme Court of the United States.
"	" "	Assignments of Error filed.
"	" "	Bond on Appeal approved and filed.
"	" "	Citation awarded and issued.
"	8, "	Service of Citation accepted by Jno. A. Davis, Sol Genl.
"	" "	Writ of Error issued and copy lodged in Clerk's office.
Mar.	5, "	Transcript of all the evidence, etc., certified by the Court and ordered to be filed and become a part of the record.
"	" "	Transcript of all the evidence, etc., Vol. 1 & 2 filed.
"	" "	Notice of contents of Transcript sur Writ of Error, filed.
"	" "	Order extending return day of Citation until the 4th day of May, 1918, entered.
"	11, "	Objections as to Contents of Transcript, filed.
"	5, "	Witness subpenas (22) returned and filed.
Apl.	24, 1918.	Order filed and entered fixing contents of record sur Writ of Error.

3 Act Approved December 17th, 1914. Relating to Opium and Known as the Harrison Anti-Narcotic Act.

In the District Court of the United States for the Western District of Pennsylvania, of November Term, A. D. 1917.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

The grand jurors of the United States of America, now inquiring in and for the Western District of Pennsylvania, after being duly impaneled, sworn, affirmed and charged at the term of said Court, now pending, upon their solemn oaths and affirmations, respectively, do present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the twenty-ninth day of March, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this court was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, twelve drams of morphine sulphate, to one, Dave G. Feigel, not in pursuance of a written order from the said Dave G. Feigel, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Dave G. Feigel, twelve drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Dave G. Feigel, a certain prescription, a copy of which is as follows:

4 "Jin Fuey Moy, M. D.

308 Grant Street,

Pittsburgh, Pa.

March 29, 1917.

℞ Dave G. Feigel, 4107 Payne Ave., Cleveland, Ohio.

Morphine Sulphate 5xii

Sig: Use as directed.
H19643.
3-29-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

and the said Dave G. Feigel was not then and there a patient of the said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only; contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

5 Second Count.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the twenty-fifth day of March, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, eight drams of morphine sulphate, to one Joe Lewis, alias Henry McKnight, not in pursuance of a written order from the said Joe Lewis, alias Henry McKnight, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Joe Lewis, alias Henry McKnight, eight drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Joe Lewis, alias Henry McKnight, a certain prescription, a copy of which is as follows:

"Jine Fuey Moy, M. D.

308 Grant Street,

Pittsburgh, Pa.

March 25, 1917.

R Henry McKnight, 48 Sibley Street, Detroit, Mich.

Morphine Sulphate 5xiii

Sig: Use as directed.
H19519.
3-25-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

6 and the said Joe Lewis, alias Henry McKnight, was not then and there a patient of said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

7 **Third Count.**

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the twenty-eighth day of April, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, twelve drams of morphine sulphate, to one Joe Lewis, alias Henry McKnight not in pursuance of a written order from the said Joe Lewis, alias Henry McKnight, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Joe Lewis, — Henry McKnight, twelve drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Joe Lewis, alias Henry McKnight, a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.

308 Grant Street,

Pittsburgh, Pa.

April 28, 1917.

8 Henry McKnight, 48 Sibley St., Detroit, Mich.

Morphine Sulphate 5xii

Sig: Use as directed.
H20684.
4-28-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

8 and the said Joe Lewis, alias Henry McKnight, was not then and there a patient of said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

9 Fourth Count.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the thirtieth day of March, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, twelve drams of morphine sulphate, to one John Capello, alias Harry Lyman, not in pursuance of a written order from the said John Capello, alias Harry Lyman, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to John Capello, alias Harry Lyman, twelve drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said John Capello, alias Harry Lyman, a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,

308 Grant Street,

Pittsburgh, Pa.

March 30, 1917.

R Harry Lyman, 3242 Cedar Avenue, Cleveland, Ohio.

Morphine Sulphate 3xii

Sig: Use as directed.
H19663.
3-30-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

10 and the said John Capello, alias Harry Lyman, was not then and there a patient of said Jin Fuey Moy and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

11 **Fifth Count.**

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the sixth day of April, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, sixteen drams of morphine Sulphate, to one John Capello, alias Harry Lyman, not in pursuance of a written order from the said John Capello, alias Harry Lyman, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter exchange, give away, dispense and distribute to John Capello, alias Harry Lyman, sixteen drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said John Capello, alias Harry Lyman a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,

308 Grant Street,

Pittsburgh, Pa.

April 6, 1917.

R Harry Lyman, 3242 Cedar Ave., Cleveland, Ohio.

Morphine Sulphate 5xvi

Sig: Use as directed.
H19904.
4-6-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

12 and the said John Capello, alias Harry Lyman was not then and there a patient of said Jin Fuey Moy and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

13 Sixth Count.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the sixteenth day of April, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, sixteen drams of morphine sulphate, to one John Capello, alias Harry Lyman, not in pursuance of a written order from the said John Capello, alias Harry Lyman, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to John Capello, alias Harry Lyman, sixteen drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said John Capello, alias Harry Lyman, a certain prescription, a copy of which is as follows:

"Jin Fuey Moy,

308 Grant Street,

Pittsburgh, Pa.

April 16, 1917.

℞ Harry Lyman, 3242 Cedar Ave., Cleveland, Ohio.

Morphine Sulphate 5xvi

Sig: Use as directed.
H20225.
4-16-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

and the said John Capello, alias Harry Lyman, was not then and there a patient of said Jin Fuey Moy and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

Seventh Count.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the eighth day of May, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, fourteen drams of morphine sulphate, to one John Capello, alias Harry Lyman, not in pursuance of a written order from the said John Capello, alias Harry Lyman, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchanged, give away, dispense and distribute to John Capello, alias Harry Lyman, fourteen drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said John Capello, alias Harry Lyman a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,
308 Grant Street,
Pittsburgh, Pa.

May 8, 1917.

℞ Harry Lyman, 3242 Cedar Ave., Cleveland, Ohio.

Morphine Sulphate 3xiv

Sig: Use as directed.
H21073.
5-8-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

16 and the said John Capello, alias Harry Lyman, was not then and there a patient of said Jin Fuey Moy and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

17 Eighth Count.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the seventh day of April, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, sixteen drams of morphine sulphate, to one Albert Williams not in pursuance of a written order from the said Albert Williams on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchanged, give away, dispense and distribute to Albert Williams sixteen drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Albert Williams a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,

308 Grant Street,

Pittsburgh, Pa.

April 7, 1917.

℞ Albert Williams, 3303 Superior Avenue, Cleveland, Ohio.

Morphine Sulphate 3xvi

Sig: Use as directed.
H19935.
4-7-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

18 and the said Albert Williams was not then and there a patient of said Jin Fuey Moy and the said morphine sulphate

was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

19 Ninth Count.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the first day of April, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, twelve drams of morphine sulphate, to one Harry Goldbaugh, not in pursuance of a written order from the said Harry Goldbaugh, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Harry Goldbaugh, twelve drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy at the time and place aforesaid, did issue and dispense to the said Harry Goldbaugh, a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,

308 Grant Street,

Pittsburgh, Pa.

April 1, 1917.

℞ Harry Goldbaugh, 1022 E. 40 St., Cleveland, Ohio.

Morphine Sulphate 3xii

Sig: Use as directed.
H19741.
4-1-17.

JIN FUEY MOY.

U. S. Registry No. 4445 23rd District of Penna."

20 and the said Harry Goldbaugh was not then and there a patient of said Jin Fuey Moy and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only contrary to the form

of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

21 Tenth Count.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the sixth day of April, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid, he, the said Jine Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, sixteen drams of morphine sulphate, to one John Henry, not in pursuance of a written order from the said John Henry, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to John Henry, sixteen drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said John Henry, a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,

308 Grant Street,

Pittsburgh, Pa.

April 6, 1917.

R John Henry, 1562 Curtis Avenue, Cleveland, Ohio.

Morphine Sulphate 5xvi

Sig: Use as directed.
H19903.
4-6-17.

JIN FUEY MOY.

U. S. Registry No. 4445 23rd District of Penna."

22 and the said John Henry was not then and there a patient of said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

23 **Eleventh Count.**

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the Twenty-seventh day of April, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid, he, the said Jine Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, twelve drams of morphine sulphate, to one John Henry not in pursuance of a written order from the said John Henry on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to John Henry twelve drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said John Henry a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,

308 Grant Street,

Pittsburgh, Pa.

April 27, 1917.

℞ John Henry, 1732 Curtis Avenue, Cleveland, Ohio.

Morphine Sulphate 5xii

Sig: Use as directed.
H20654.
4-27-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

24 and the said John Henry was not then and there a patient of said Jin Fuey Moy and the said morphine sulphate was dispensed and distributed by the said Fin Fuey Moy not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

25 **Twelfth Count.**

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the Twenty-fifth day of April, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid, he, the said Jine Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, four drams of morphine sulphate, to one Ralph Oyler, alias John Lyon, not in pursuance of a written order from the said Ralph Oyler, alias John Lyon, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the sai- Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Ralph Oyler, alias John Lyon, four drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Ralph Oyler, alias John Lyon, a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,

308 Grant Street,

Pittsburgh, Pa.

April 25, 1917.

R John Lyon, 245 W. Rich Street, Columbus, Ohio.

Morphine Sulphate.....Grn cxxl

Sig: Use as directed.
H20578.
4-25-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

26 and the said Ralph Oyler, alias John Lyons, was not then and there a patient of said Jin Fuey Moy and the said morphine sulphate was dispensed and distributed by the said Fin Fuey Moy not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

27 **Thirteenth Count.**

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the twenty-eighth day of April, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid, he, the said Jine Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, four drams of morphine sulphate, to one Ralph Oyler, alias John Lyon, not in pursuance of a written order from the said Ralph Oyler, alias John Lyon, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Ralph Oyler, alias John Lyon, four drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Ralph Oyler, alias John Lyon, a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,
308 Grant Street,
Pittsburgh, Pa.

April 28, 1917.

℞ John Lyon, 245 W. Rich Street, Columbus, Ohio.

Morphine Sulphate.....gr cxxl

Sig: Use as directed.
Addict.
#20708.
4/28/17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

28 and the said Ralph Oyler, alias John Lyon, was not then and there a patient of said Jin Fuey Moy and the said morphine sulphate was dispensed and distributed by the said Fin Fuey Moy not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

29 **Fourteenth Count.**

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of the said district, heretofore, to wit, on the ninth day of April, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, fifteen drams of morphine sulphate, to one Harry Aarons, not in pursuance of a written order from the said Harry Aarons, on a form issued in blank for that purpose my the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Harry Aarons, fifteen drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Harry Aarons, a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,

308 Grant Street,

Pittsburgh, Pa.

April 9, 1917.

℞ Harry Aarons, 519 East 65th Street, Cleveland, Ohio.

Morphine Sulphite.....5xv

Sig: Use as directed.
H19694.
4-9-17.

JIN FUEY MOY.

U. S. Registry No. 4445 23rd District of Penna."

30 and the said Harry Aarons, was not then and there a patient of said Jin Fuey Moy and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

31 Fifteenth Count.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of the said district, heretofore, to wit, on the twenty-second day of April, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, ten drams of morphine sulphate, to one Jack Davis, not in pursuance of a written order from the said Jack Davis, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Jack Davis, ten drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Jack Davis a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,

308 Grant Street,

Pittsburgh, Pa.

April 22, 1917.

R Jack Davis, 2574 East 90th Street, Cleveland, Ohio.

Morphine Sulphate.....5x

Sig: Use as directed.
H20465.
4-22-17.

JIN FUEY MOY.

U. S. Registry No. 4445 23rd District of Penna."

32 and the said Jack Davis, was not then and there a patient of said Jin Fuey Moy and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace, and dignity of the United States of America.

33 Sixteenth Count.

An the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of the said district, heretofore, towit, on the twenty-second day of April, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, twelve drams of morphine sulphate, to one Harry Moore, not in pursuance of a written order from the said Harry Moore, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Harry Moore, twelve drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Harry Moore, a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,

308 Grant Street,

Pittsburgh, Pa.

April 22, 1917.

R Harry Moore, 2111 Ninth Avenue, Altoona, Pa.

Morphine Sulphate.....3xii

Sig: Use as directed.
H20462
4/22/17

JIN FUEY MOY

U. S. Registry No. 4445 23rd District of Penna."

34 and the said Harry Moore was not then and there a patient of said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

35 **Seventeenth Count.**

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of the said district, heretofore, to wit, on the twenty-sixth day of April, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, sixteen drams of morphine sulphate, to one Emily Kate, not in pursuance of a written order from the said Emily Kate, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Emily Kate, sixteen drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Emily Kate, a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,

308 Grant Street,

Pittsburgh, Pa.

April 26, 1917.

R Emily Kate, 410 Fifth Street, Canton Ohio.

Morphine Sulphate 3xvi

Sig: Use as directed.
Addict.
H29827.
4-26-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

36 and the said Emily Kate, was not then and there a patient of said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Fin Fuey Moy not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

37 **Eighteenth Count.**

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the twenty-ninth day of April, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, sixteen drams of morphine sulphate, to one Herman Weber, not in pursuance of a written order from the said Herman Weber, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Herman Weber, sixteen drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Herman Weber, a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,

308 Grant Street,

Pittsburgh, Pa.

April 29, 1917.

R Herman Weber, 910 Liberty Avenue, Pittsburgh, Pa.

Morphine Sulphate 3xvi

Sig: Use as directed.
H20736,
4-29-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

38 and the said Herman Weber was not then and there a patient of said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy, not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

39 **Nineteenth Count.**

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the second day of May, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, sixteen drams of morphine sulphate, to one Joseph Whalen, not in pursuance of a written order from the said Joseph Whalen, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Joseph Whalen, sixteen drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Joseph Whalen, a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,

308 Grant Street,

Pittsburgh, Pa.

May 2, 1917.

℞ Joseph Whalen, 1432 Broadway, Brooklyn, N. Y.

Morphine Sulphate 3xvi

Sig: Use as directed.
H20862.
5-2-17.

JIN FUEY MOY.

U. S. Registry No. 4145, 23rd District of Penna."

40 and the said Joseph Whalen, was not then and there a patient of said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy, not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

41 Twentieth Count.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do furth- present, thate Jin Fuey Moy, late of said district, heretofore, to wit, on the seventh day of May, in the year of our Lord, one thousand nine hundred and seventeen at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, sixteen drams of morphine sulphate, to one Paul Stein, not in pursuance of a written order from the said Paul Stein, on a form issued in blank for that *pur*pose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Paul Stein, sixteen drams of morphine sulphate, in manner following, to wit, that the *said* Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Paul Stein, a certain prescription, a copy of which is as follows:

"Jin Fuey Moy, M. D.,
308 Grant Street,
Pittsburgh, Pa.

May 7, 1917.

R Paul Stein, 2248 Wabash Avenue, Chicago, Ill.

Morphine Sulphate 5xvi

Sig: Use as directed.
H21031.
5-7-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

42 and the said Paul Stein was not then and there a patient of said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy, not in the course of his professional practice only contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

(Signed) E. LOWRY HUMES,
United States Attorney.

[Endorsed:] Form No. 168. Back or Cover of Indictment With Plea and Judgment. Witnesses: Emil Koos, Ralph H. Oyler, Wm. Trustun, C. F. Geist, C. G. Lewellyn. Above witnesses whose names are checked sworn by me this 23 day of Nov. A. D. 1917. D. M. Griffith, Foreman. No. —. Nov. Term, 1917. United States District Court Western District of Pennsylvania. The United States vs. Jin Fuey Moy. Indictment for —. A True Bill. D. M. Griffith, Foreman Grand Jury. Filed Nov. 23, 1917. J. Wood Clark, Clerk. E. Lowry Humes, U. S. Attorney.

43 *Plea.*

The defendant Jin Fuey Moy waives arraignment and pleads Not Guilty in open Court, this 17th day of December, 1917.

JIN FUEY MOY, *M. D.*

Verdict.

We, the jury, find the defendant —— ——, —, this — day of ——, 191–.

—— ——, *Foreman.*

Sentence.

Whereupon, it is considered, ordered, and adjudged by the Court, that the said defendant —— —— be imprisoned in the common jail of —— County, for the term of — months, that he pay a fine of — dollars and costs of prosecution, and that he remain imprisoned in said jail until said fine and costs are paid, or until he is otherwise discharged by law.

In open Court, this the — day of ——, 191–.

—— ——, *U. S. Judge.*

44 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1917.

No. 89, Criminal Docket.

UNITED STATES

vs.

JIN FUEY MOY.

Motion to Quash the Indictment.

Filed December 10, 1917.

And now, to wit, this 10th day of December, 1917, comes Jin Fuey Moy, the defendant above named, by John W. Dunkle and N. S. Williams, his attorneys, and moves the Court to quash the indictment returned in this case, as defective and insufficient in law

to compel the defendant to answer the alleged offense therein set forth for the reason- following, to wit:

First. "The so-called Harrison Act" under which the indictment is found, is unconstitutional and void.

Second. It violates the tenth amendment of the Federal Constitution, as to the reserved rights of the State, as said Harrison Act is an attempt to regulate commerce wholly within a State, and to exercise police powers therein on the part of the United States.

Third. It violates said provisions in attempting to regulate the practice of medicine within the States.

Fourth. The indictment does not charge the defendant with the commission of any offense against the United States.

Fifth. The acts of the defendant averred in the indictment are not prohibited by law, nor are they in violation of any law of the United States.

45 Sixth. The indictment, as a whole, does not charge the defendant with the commission of any offense prohibited by the so-called "Harrison Anti-Narcotic —" or with the commission of an offense prohibited by any other law of the United States.

(Signed) JOHN W. DUNKLE,
(Signed) N. S. WILLIAMS,
Attorneys for the Defendant.

46 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1917.

No. 89.

UNITED STATES

vs.

JIN FUEY MOY.

Opinion.

Filed Dec. 11, 1917. J. Wood Clark, Clerk.

THOMSON, *J.*:

This is a motion by the defendant to quash an indictment drawn under Section 2 of the Harrison Anti-Narcotic Act. The indictment contains twenty counts, which are the same in form, each setting forth a prescription in which certain grains of morphine sulphate *is* alleged to have been unlawfully dispensed to the party therein named.

Defendant moves to quash the indictment, assigning six reasons therefor. The first, second and third reasons aver the unconstitutionality of the Harrison Act, and cannot be sustained. The substance of the fourth, fifth and sixth reasons is that the indictment as drawn does not charge the defendant with the commission of any offense prohibited by the Harrison Act. The first count (the others

being similar in form) charges that the defendant was a practising physician and at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to-wit, twelve drams of morphine sulphate, to one Dave G. Feigel, not in
47 pursuance of a written order from the said Dave G. Feigel on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17, 1914, and known as the "Harrison Anti-Narcotic Act." Without question, the indictment thus far distinctly charges an offense under Section 2. The first exception to that section reads as follows, viz: "Nothing contained in this section shall apply (*a*) to the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon, registered under this Act, in the course of his professional practise only," with certain requirements as to the keeping of records. It was not necessary for the pleader to negative this exception, as it is entirely separated from the words of the section defining the offense. The rule of pleading in such case is clearly set forth in United States vs. Cook, 17 Wall. 168, as follows:

"Where a statute defining an offense contains an exception in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may clearly omit any such reference, as the matter contained in the exception is matter of defense, and must be shown by the accused."

As it was not necessary in this case for the pleader to negative the exception, is there anything in the subsequent words of the indictment that destroy the legal effect of the previous words wherein the charge is specifically and legally made? After charging the offense as above quoted, the indictment proceeds, "That is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully and wilfully, knowingly and feloniously sell, barter, ex-
48 change, give away, dispense and distribute to Dave G. Feigel twelve drams of morphine sulphate in manner following, to-wit, that the said Jin Fuey Moy at the time and place aforesaid, did issue and dispense to the said Dave G. Feigel a certain prescription, a copy of which is as follows (then follows a copy of the prescription signed by the defendant, wherein twelve grains of morphine sulphate are prescribed to Dave G. Feigel, to be used as directed). "And the said Dave G. Feigel was not then and there a patient of the said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only, contrary to the form of the Act of Congress," etc.

The Offense under Section 2 is to sell, barter, exchange or give away any of the prescribed drugs, except in pursuance of an order on the designated order form. The registered physician may successfully defend on the ground that he "did not dispense or distribute" the drug in question, except to a patient in the course of his professional practise only. But this is a defense which must be set up by the physician, in order to escape the general requirements prescribed in Section 2. The words in which exception "a" are negatived in the indictment, must be read in the light of the words in which the offense is charged under the general provisions of Section 2. It is alleged under the videlicet, that the defendant "did unl wfully, wilfully, knowingly and feloniously sell, barter, exchange and give away," with the additional words "dispense and distribute," to Feigel the drug in question. This is followed by giving the manner of the disposition of the drugs, by the issuing to Feigel of the prescription therein set forth. To this there can be but one meaning, that is, that the drugs were disposed of by means of the prescription. Then follow words which take the physician out of the exception, namely, that Feigel was not a patient of the
49 physician, and the morphine sulphate was dispensed and distributed by the physician not in the course of his professional practice only. It cannot be complained that the words "dispensed and distributed" are not used in the enacting clause of Section 2. In order to escape the effect of the words "sell, barter, exchange or give away" used in the enacting clause of Section 2, the physician must show that the drugs so disposed of were dispensed or distributed by him to a patient in the course of his profe—ional practice.

I think that the indictment sufficiently charges a violation of Section 2 of the Harrison Act, and the motion to quash must therefore be overruled.

To which action of the Court defendant excepts, and on his motion exception allowed and bill sealed.

W. H. S. THOMSON, *Judge*.

49½ *Testimony of Charles F. Geist and Dr. Horatio C. Wood, Jr.*

Pages of Testimony 2 to 56.

50 CHARLES F. GEIST, called on behalf of the Government, being duly sworn, testified as follows:

Q. What is your business?
A. United States Narcotic Inspector.
Q. Were you Narcotic Inspector in the month of April, 1917?
A. Yes, sir.
Q. At that time, where were you?
A. In the month of April?
Q. Yes.
A. I came to Pittsburgh in the latter part of the month; I think it was the 29th.

Q. After you came to Pittsburgh, did you have any occasion to visit the store of Joseph Fleming & Son Company?

A. I did, sir.

Q. Did you make an investigation there?

A. I did.

Q. Did you receive any prescription from the firm of Joseph Fleming & Son Company at that time?

A. At the time I made my inspection, yes.

Q. That was in April, 1917?

A. In May.

Q. Who gave you the prescriptions?

A. Mr. Staley, Arnold Staley.

Q. Did Arnold Staley state what his position was there?

Mr. Marshal: We will admit that he was the Manager of the Joseph Fleming Drug Company; and we will admit that Mr. John A. Staley was the President of the Company, and we will admit that Mr. Larkin was the Secretary and Treasurer of the Joseph Fleming Drug Company—whatever its corporate name is, as set forth in the indictment. And we will admit without proof that those prescriptions as contained in these books were filled by the Joseph Fleming & Son Drug Co. [illegible].

51 Mr. Henry:

Q. How many books were there containing prescriptions, Mr. Geist?

A. Seven books.

Fourteen packages of prescription forms were here produced and marked as U. S. Exhibits Nos. 1-A to 1-N, inclusive.

Seven prescription books were also produced and marked as U. S. Exhibits Nos. 2, 3, 4, 5, 6, 9 and 10 of this date.

Two packages of prescriptions were also produced and marked U. S. Exhibits Nos. 11 and 12 of this date.

All of the said above identified exhibits were offered in evidence by counsel for the Government.

It is admitted by counsel for the defense that all of the prescriptions contained in these various exhibits are prescriptions purporting to be prescriptions of Dr. Jin Fuey Moy, and are signed by him and are in his handwriting.

It is also admitted by counsel for defense that all of the prescriptions contained in the books offered, and all the prescriptions that were received by Mr. [illegible] of the Joseph Fleming & Son Company were filled by said Co[illegible].

52 Dr. HORATIO C. WOOD, JR., a witness called on behalf of the Government, being duly affirmed, testified as follows:

Direct examination.

By Mr. Henry:

Q. Where do you live?
A. In Philadelphia.
Q. What is your business there?
A. I am a practicing physician and also Professor of Pharmacology and Therapeutics in the University of Pennsylvania.
Q. Of what college are you a graduate?
A. I graduated in the University of Pennsylvania in 1896.
Q. Since 1896, state whether or not you have been engaged in the practice of medicine?
A. I have, with the exception of three years, in which I was engaged in research work for the University.
Q. What three years were they that you were engaged in research work?
A. From 1907 to 1910, I think.
Q. This work that you teach in the University of Pennsylvania, state whether or not that has any relation to narcotic drugs such as morphine sulphate?
A. Pharmacology, in which I hold a chair, is the science which teaches of drugs and their uses, and therefore has to do with all substances used in medicine, including morphine as well as other drugs.
Q. What is morphine?
A. Morphine is an alkaloid obtained from opium.
Q. What do you mean by an alkaloid?
A. An alkaloid is a vegetable property which is capable of acting with alkali when used with acids to form salts. In the case of morphine it is morphine combined with sulphuric acid, when it is known as morphine sulphate.
Q. What is the form of morphine sulphate in physical appearance, as compared with morphine itself?

53 A. They are practically indistinguishable.
Q. What do you say with respect to one being crystallized?
A. Well, you can crystallize morphine. Morphine sulphate is used, because it is soluble in water, and morphine itself is not soluble in water.
Q. Then what is the usual commercial form of morphine?
A. Morphine sulphate.
Q. You say it is an alkaloid.

—, ——.

Q. State whether or not it is a derivative of opium.
A. It is a derivative of opium.
Q. State whether or not morphine sulphate is a poisonous drug.
A. Yes, it is a poison.
Q. What is the comparative deadliness of morphine sulphate, as compared with opium?
A. I would say it is about ten times as deadly as opium.

Q. You mean that the full quantity of opium required to be deadly would be eight times as much as the quantity of morphine sulphate to be deadly?

A. Approximately.

Q. What are the uses of morphine sulphate in the medical profession?

A. Morphine is used, in the first place, to quiet pain; secondly, to produce sleep; and thirdly, to relieve cough; sometimes used to stop diorrheas; and occasionally for less common uses. Those are the normal uses.

Q. To a person suffering pain, one who has not used morphine sulphate, and it is being administered to such a person to alleviate pain, state the size of the required dose.

A. Ordinarily the dose would run from one-twelfth to one-quarter of a grain.

Q. How many grains of morphine sulphate are there in an ounce?

A. 480. That is, in a prescription ounce. The commercial ounce, on which the druggist buys morphine, contains 437 grains.
54 But the ounce which the doctor prescribed for contains 480 grains.

Q. Then prescriptions are always written on a basis of 480 grains to the ounce?

A. Yes.

Q. What is the sub-division between ounces and grains?

A. Well, the one commonly used is the dram. There are two sub-divisions recognized; one is the scruple, which contains twenty grains; but that is very little used today. The common one is one dram, which contains sixty grains, or one-eighth of an ounce.

Q. How many ordinary doses, then, would there be in a dram?

Objected to by counsel for defense, as simply a matter of calculation for the jury.

Question withdrawn.

Q. Doctor, how long have you been with the University of Pennsylvania?

A. I was with the University of Pennsylvania from 1899 to 1910, when I accepted a chair at the Medico Chirurgical College, which merged with the University of Pennsylvania last year, at which time I came back to the University of Pennsylvania. So, altogether, I have been connected with the University for twelve or thirteen years, I think.

Q. State whether or not you have written any text-books.

A. I have. I am the author of a text-book on Pharmacology and Therapeutics. I am one of the editors of the U. S. Dispensatory. I am also Vice-Chairman of the Committee on Revision of the United States Pharmacopeia. I wrote the chapter on "Modern Treatment." I wrote the chapter on "Treatment of Drug Poisonings and Drug Habits."

Q. State whether or not you have had any occasion, since you began the practice of medicine, to make a study of drug habits.

A. Yes. In the first place, in connection with my teaching work, it is part of my duty to teach symptoms and management of

55 cases of drug habituates. And I also served on a committee in Philadelphia for investigating the question of the drug habit evil there in the city of Philadelphia.

Q. At what time was that period of investigation that you speak of?

A. That investigation ran for about a year and a half, terminating last summer; some time about last July, I believe.

Q. State the nature of your investigation of the drug habit in this period you speak of.

A. Do you mean in connection with this committee?

Q. Yes.

A. We had in the first place, the United States Attorney for the District of Philadelphia. He would report cases that were brought to his attention to the Committee for investigation. We had a couple of social workers to investigate the social conditions of these patients. They were then sent to the physicians' offices; there was one other physician besides myself engaged in this work. We would interview each case and some of them we would refer to hospitals for treatment.

Q. What do you mean by an addict?

A. An addict is a person who is a habitual user of a drug, of a habit-forming drug.

Q. State whether or not morphine sulphate is a drug such as will cause a habit.

A. Morphine sulphate is a habit-forming drug.

Q. What is the effect of morphine sulphate on the user who has acquired the habit, with respect to his character and his personal appearance?

Objected to by counsel for defense, as immaterial and irrelevant. Objection overruled and exception noted to defendants.

A. Generally speaking, it has a deleterious effect both on the man's character and on his physical health. He becomes unreliable and, very often untruthful. He is unable to concentrate his mind
56 for any long period of time. He becomes physically weak; very often loses a great deal of weight. And if the case is a severe one, then become incapable of doing any useful work. I might say, however, might take small quantities without any very serious effects on their health. But those persons are in a small minority.

Q. What do you mean by "small quantity"?

A. Oh, I would say up to three or four grains a day.

Q. Doctor, state from your experience with the habits of the user of drugs, such as an addict, as to the extent he would go in order to secure the drug when out of it?

Objected to by counsel for defense, as incompetent and irrelevant; and also object to the competency of the witness.

By the Court: In a general way, I think this might be shown. The objection is overruled, and an exception noted to defendants.

Mr. Henry:

Q. Do you understand the question, doctor?

A. Yes, I think I do. There is nothing that he would not do to obtain the drugs, except, perhaps, crimes of violence, because one of the effects of the morphine on him is to make him physically weak, and therefore he is not capable of carrying out crimes of violence, generally speaking. But he will lie, or steal, or do most anything else, to get the drug.

Q. What is the effect on a user of morphine sulphate who is an addict, when deprived of the drug?

Mr. Marshall: This is objected to, as immaterial and irrelevant and incompetent, and the competency of the witness is also
57 objected to. Your Honor understands that I don't want to be making objections all the time, as though we were trying to keep something out, and I would therefore like to have an offer.

Mr. Henry: The Government proposes to prove by the witness on the stand that the user of the drug, when deprived of it, suffers a great amount of pain.

No objection.

A. He becomes very nervous, sometimes nauseated, sleepless, and frequently has marked pains in various parts of the body. If he is deprived for a very long period of time, the suffering becomes very extreme.

Q. What is the method of treatment of an addict to effect a cure?

A. Well, I presume you want me to give the method of treatment that I practice?

Q. Well, I would rather you would give the standard treatment.

A. Well, there is no single standard of treatment. There are different men who have difference modes of treatment.

Q. Well then, give the various modes of treatment.

A. In the first place, I might say that the treatment would be divided into two stages. The first stage is what is known as the withdrawal stage, and that means looking after the patient until he is able to be left without morphine without intense suffering. Then the subsequent treatment must be to upbuild his general health, his nervous system, and his moral character. The subsequent treatment may extend over a period of months or even years. The difference of opinion among the medical profession is in regard to the first part of the treatment, the withdrawal treatment. There are two recognized methods of withdrawal. One is the abrupt withdrawal, in stopping the use of the drug immediately. And
58 the other is a more gradual withdrawal, which may be spread over a period of one or maybe two weeks, with a daily reduction in the dose that the patient is receiving. In both of these methods of treatment, of course other drugs will be used to quiet the patient's suffering as much as possible. It is generally believed that it is better, no matter which method of withdrawal is employed, that the patient be under the absolute control of the physician.

Otherwise, he is likely to obtain morphine from other sources than that which has been ordered by the doctor.

Q. State whether or not it is possible to treat an addict by any treatment by placing in his hands from one to sixteen drams a day.

Objected to by counsel for defense, for the reason that the question does not state whether it is a treatment for a cure or a treatment to carry the patient along for the time being.

Question reframed:

Q. State whether or not it is possible to treat an addict to effect a cure by placing in his hands one to sixteen drams of morphine sulphate at one time.

A. I do not think so. May I modify that answer, and say that I do not think it is possible to cure him by such method.

Q. State whether or not, in these methods of treatment that you have outlined, you have in mind treatment to effect a cure?

A. Yes, sir.

Q. Doctor, are there any recognized standards in the dispensing of morphine sulphate by physicians, as to what constitutes *of* professional practice? Answer that yes or no.

A. I really don't know just exactly what the question means.

Question withdrawn.

Q. Among reputable physicians, doctor, is there or is there not a recognized standard of the amount of morphine sulphate to
59 be written, or to be dispensed, on a written prescription?

Objected to by counsel for defense, as incompetent, irrelevant and immaterial.

After some discussion, the Court said: The use of the word "reputable" might be questionable.

Mr. Henry:

Q. We will withdraw that question and put it in this form; State whether or not there is a standard among physicians generally as to the amount of morphine sulphate that is dispensed on a written prescription?

Objected to by counsel for defense, as incompetent, irrelevant and immaterial.

By the Court: Under the indictment as drawn, perhaps one of the questions for the jury ultimately to determine is whether or not the defendant,—that is, the physician, dispensing the drug in question, was engaged in the legitimate practice of his profession, the words which are used in Section 2 of the Harrison Act. It is, of course, ultimately a question for the jury to determine, under all the facts and circumstances of the case. But if there is a standard recognized in the profession by which they measure it to some extent, I think the testimony would be competent—the effect of the

testimony being for the jury, under all the facts and circumstances of the case.

Objection overruled, and exception noted to defendants.

A. There is no definite figure. There is feeling among physicians——

Objected to by counsel for defense.

By the Court: Only so far as it it a generally recognized practice.

60 A. Well, there is no law, either of the State or a law of the medical societies that sets down any definite standard. It is simply a standard of sentiment among the medical profession and a question of medical ethics.

Mr. Henry:

Q. Well, is there a recognized standard of medical ethics?

Objected to by counsel for defense, as incompetent, immaterial and irrelevant.

By the Court: If it is merely an ethical standard, I think it would not be competent. But if there is a standard which governs physicians in endeavoring to comply with the law—if there is a general standard of practice, I think such standard might be given. But merely on sentimental or ethical ground, I think it would not be competent.

Mr. Henry:

Q. Doctor, is there a general standard of practice, among physicians, as to writing sixteen drams?

Mr. Marshall: In view of the last answer of the witness, the question is objected to, as immaterial, irrelevant and incompetent and leading.

By the Court: Well, unless the answer is qualified or explained, perhaps it would exclude any standard that would be recognized as a controlling standard, if it is merely ethical. It is a question of whether or not there is a standard recognized by those who are endeavoring to comply with the law. Unless the doctor can say there is such, he would not be competent to speak on that subject. I think it is all embraced in what we understand as the legal meaning of the terms used in the Act, and the question of what is legitimate practice of the profession are terms used in the Act.

61 Now, someone has to decide what that is, whether it is legitimate or whether it is not legitimate. And naturally that is a matter for expert testimony of those who are familiary with the practice, as recognized by physicians or experts in that line. I think the inquiry is entirely competent, but the witness may possibly have disqualified himself to speak, if he puts it entirely upon ethical

grounds because that would be eliminating the legal question. If there is a recognized practice among physicians, those who are endeavoring to comply with the law of the land, and that is supposed to be in harmony with the question of what is proper for the body—if there are such standards, that is evidence for the consideration of the jury; not necessarily conclusive but still evidence. But I think it must be based on the legal rather than on an ethical ground. So that I may be understood: If there is among physicians and those engaged in this work a standard which is generally recognized with reference to the amount which may be prescribed by a physician in the ordinary course of his practice and in the legitimate practice of his profession, then, within reasonable limits, I think the witness might give it. Of course, if there is no such standard based upon the law, then the witness couldn't testify. Not that it may necessarily be written down in the statute—but those in the profession who are endeavoring to comply with the law of the land as they understand it. That is my idea.

(Question withdrawn for the present.)

Mr. Henry:

Q. Doctor, the Harrison Narcotic Law, in Exemption "A," under Section 2, states: "Nothing contained in this section shall
62 apply to dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon, registered under this Act, in the course of his professional practice only." State whether or not there is a recognized standard among physicians generally as to what constitutes a proper dispensing or distribution "in the course of professional practice only?

Mr. Marshall: That is object- to, as incompetent, and irrelevant, and that the witness is incompetent; and for the further reason that the doctor has already answered the question, stating that there is no such definite standard, except from sentiment and the ethics of the practice.

By the Court: After the discussion, in the presence of the witness, the doctor may answer, if there is such a standard. The objection is overruled, and an exception noted to the defendants.

A. It would be necessary to make a distinction between addicts and normal individuals, because there is a difference.

Mr. Henry:

Q. State whether or not there is a standard.

By the Court: The first question is, whether or not there is such standard; and, then, if there is, he can give it.

Mr. Henry:

Q. Among physicians generally.

A. I think I answered that question as well as I could before. It

seems to me it is simply the same question that I have answered, that there is no definite, legal standard. It is simply a question of moral ethics. That is, as applied to normal individuals. There is a legal standard, as applied to drug addicts.

Q. That's what I want to get at. There is a legal standard

63 as applied to drug addicts.

Q. That's what I want to get at. There is a legal standard as applied to drug addicts?

A. Yes.

Q. What is that standard?

Objected to by counsel for defense, for the reason that if there is a legal standard, that is the best evidence of it, the law itself, not what the doctor thinks.

Objection overruled, and exception noted to defense.

A. The law in this state is that——

Mr. Marshall: Now, the doctor goes on to state what the law of the State is. There is the law itself.

Mr. Henry: I don't know what the answer will be, but if there is a law of the State that establishes a certain standard, it certainly would be evidence.

Mr. Marshall: But the law will speak for itself.

Mr. Henry: I don't understand him to mean a statutory law.

A. Yes, I do.

By the Court: If the witness refers to a statutory law of the State, the objection will be good, because the statute will speak for itself.

Mr. Henry:

Q. Is there a legal standard for complying with the Harrison law, as to what constitutes professional practice only, generally among physicians?

Objected to by counsel for defense, as generally incompetent, immaterial and irrelevant; and for the further reason that the doctor has already answered the question.

By the Court: If the question, as I understand it refers to

64 the standard of practice as recognized and exercised by physicians generally with reference to dispensing of drugs on prescriptions to addicts—if there is such a rule or practice which is general, I think the witness may give it. The objection is overruled, and an exception noted to defense.

A. Do you mean fixed by statutory law?

By the Court:

Q. Yes.

Mr. Williams: I object to the competency of this witness. He

has not shown himself competent to answer what the statutory laws are throughout the United States.

By the Court: I think his experience generally will enable him to speak, if he says he knows. That is the first question.

Mr. Henry:

Q. You may answer the question generally, as to whether there is a legal standard of complying with the Harrison law as to what constitutes professional practice only among physicians.

Objected to by counsel for defense, as incompetent, irrelevant and immaterial, and that the witness has already answered the question.

Mr. Henry: I will omit the word "legal" from that question.

By the Court: Objection overruled, and exception noted to the defendants. I understood the witness to state that there is a standard with relation to addicts.

A. I think I might say yes.

65 Mr. Henry:

Q. What is that standard with respect to a prescription calling for sixteen drams of morphine sulphate?

Objected to by counsel for defense, as leading, as incompetent, and as immaterial and irrelevant.

By the Court: The standard, of course, refers to amount?

Mr. Henry: Yes, to amount.

Objection overruled, and exception noted to defense.

A. I would say that that would be evidence of a desire to practice medicine illegitimately.

Mr. Marshall: I ask that that answer be stricken from the record, first, as not responsive to the question; second, as giving an opinion, which is solely for the Court, and not for doctors, to determine; third, as usurping the powers of the jury in determining what is or is not legal.

By the Court: I think that answer may be stricken out. The question is whether there is a recognized standard of practice among physicians generally, with reference to the amount that may be prescribed to addicts. You have said there is such standard. Now, it would be competent to give that standard in relation to the amount.

A. Well, Your Honor, I misunderstood the question. I did not understand that "standard" referred to amount only.

By the Court: As I understand, that is just what it does refer to.

66 Mr. Henry: As far as this question is concerned. The purpose of the question is to determine whether a prescription of sixteen drams would be in conformity to the practice.

By the Court: Without referring to any particular amount, I think the standard ought to be given, if there is such standard.

A. Well, there is no such standard, in the meaning of any definite amount.

Q. Is there within limits?

Mr. Marshall: Your Honor will pardon me if I object to your question?

By the Court: I will withdraw the question. The objection is sustained.

Mr. Henry:

Q. Is it legitimate practice among physicians generally to place in the hands of an addict at one time sixteen drams of morphine sulphate?

Objected to by counsel for defense, as irrelevant, incompetent and immaterial; and further incompetent for the reason that the witness has already said there is no such standard; and for the further reason that the legality of the question is for the Court and not for physicians.

By the Court: The difficulty as the matter now stands is that the witness had disqualified himself by the answer.

Mr. Humes here called the attention of the Court to the fact that many of the prescriptions that had been offered in evidence are prescriptions—although they have not been read in evidence,
67 but it is not denied—for as much as sixteen drams, and this is a specific question as to whether or not sixteen drams placed in the hands of an addict at one time is a legitimate practice and proper treatment.

By the Court: The inquiry is competent, providing there is some measure, or standard. But if there is not any, then it would not be competent, from the witness's own statement.

Question withdrawn for the present.

Mr. Henry:

Q. Dr. Wood, in treating an addict for a cure, state whether or not it would be legitimate practice for a physician to place in his control the drug morphine sulphate?

Objected to by counsel for defense, that it is asking the witness to determine whether that is legitimate practice, when that is a question for the Court and jury.

By the Court: I think this objection will have to be sustained. The facts with reference to the drug, its effect, and all those matters pertaining to the administering of the drug, might be given. But this is a conclusion, which is the ultimate conclusion which must be

drawn by the jury. And it is going further, I think, than should be allowed.

After discussion of some length, the question was withdrawn and put in this form:

Mr. Henry:

Q. In treating an addict for a cure, state whether or not it would be proper practice for a physician to place in the hands of the patient the drug, morphine sulphate?

Counsel for defense renew their objection.
Objection overruled and exception noted to defense.

68 A. In my opinion, it would not be proper practice.

Q. State whether or not, in your opinion, it would be proper practice, irrespective of the amount?

Counsel for defense make the same objection.
Objection overruled, and exception noted for defense.

A. In my opinion, it would not be proper practice, irrespective of the amount.

Cross-examination.

By Mr. Marshall:

Q. Doctor, you gave us in your examination in chief the general results of the use of morphine sulphate. Are the withdrawal signs, as they exhibit themselves in a general way, first, a vain uneasiness and a restlessness and sense of depression; followed by yawning, sneezing, excessive mucous secretion, sweating, nausea, uncontrolled vomiting and purging, twitching and jerking to violent jactitation, intense muscular cramps and pains, abdominal distress, marked circulatory and cardiac insufficiency and irregularity, pulse going from extremes of slowness to extremes of rapidity, with loss of tone, faces drawn and haggard, pallor deepening to grayness, exhaustion collapse, and, in some cases, death?

A. Why, they may have any of those symptoms, but not necessarily have them all in the same patient.

Q. But some of or part of those symptoms frequently follow the withdrawal of the drug?

A. Yes, they would have one or more of those symptoms.

Q. And you would have more of them in a case where the addict was a person who daily used a large amount of morphine sulphate?

A. I wouldn't say you would have more of the symptoms; you would probably have them more severely.

Q. Yes. They would be more severe?

A. Yes.

69 Q. Do you consider a narcotic drug addiction a definite physically diseased condition?

A. If you limit that to morphinism, I would say yes, of course narcotic drugs——

Q. No, I mean morphine.

A. Yes.

Q. In other words, if a patient has used morphine to such an extent that he has become an addict in the general acceptation of the word, he has a diseased condition?

A. Yes.

Q. Doctor, you say in the treatment of this disease there are two stages; first, the withdrawal stage, and there is a good deal of difference of opinion among doctors as to the proper course of withdrawal, is there not?

A. As to the rapidity of the withdrawal.

Q. Some doctors believe in a withdrawal extending over a period of a month, do they not?

A. I don't think so. Of course, when you are talking about a medical case, the difference between fourteen days and fifteen days you couldn't see in an individual case. But I don't recall of having heard of any authority who carried the withdrawal as long as a month.

Q. To what extent have you yourself treated patients who were addicts, in the withdrawal of the drug, or during the withdrawal period?

A. I have treated some of them, but not a very large number.

Q. And to what extent were those that you have treated addicted to the drug?

A. I think the largest amount was about twenty grains a day.

Q. And others, I suppose, were addicted to a less degree?

A. Yes, sir.

Q. And were you able to withdraw the drug from those
70 addicted to a less degree in a shorter time than you were from those that were addicted to a larger amount?

A. Yes, sir.

Q. And some of them, you say, ran over two weeks—did I understand you to so state, doctor?

A. Well, it might have been ten days or it might have been fourteen days. I cannot state that, however, from my memory, whether it was ten days or fourteen days. It was something under two weeks.

Q. And when you were speaking of the proper practice as to giving into the hands of a patient morphine, you were speaking of cases which you were attempting to cure?

A. Yes, where a cure was attempting to be made.

Q. Yes, where you were attempting a cure.

A. Yes Your question refers to me personally?

Q. No, I mean where a cure was being attempted?

A. Yes.

Counsel for Government specifically offer in evidence one of the prescriptions embraced in U. S. Exhibit No. 12, reading as follows: Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa. April 17, 1917. Harry B. Palmer, 612 Grant Street, Pittsburgh, Pa. Morphine sulphate, grains 240. Sig.—Use as directed. Jin Fuey Moy. With a drug-tore notation, "H-20272. 4/17/17."

Also specifically offer prescription embraced in U. S. Exhibits

Nos. 11 and 12, as follows: "Jin Fuey Moy, M. D. April 30, 1917. John Lyons, 245 West Rich. Street, Columbus, Ohio. Morphine sulphate, 5 drams. Sig.—Use as directed. Jin Fuey Moy."
71 U. S. Register No. 4145.

Government also specifically offers a prescription contained in U. S. Exhibits Nos. 11 and 12, as follows: Jin Fuey Moy, M.D. April 22, 1917. Harry Moore, 2111 Ninth Ave., Altoona, Pa., Morphine sulphate, drams 10. Sig.—Use as directed. Jin Fuey Moy. With the drugstore notation of the Fl ing Drug Company as follows:—H. 20462. 4 22 17.

Government also specifically offers a prescription contained in U. S. Exhibits Nos. 11 and 12 as follows:—Jin Fuey Moy, April 22, 1917. Jack Davis, 2574 East Fiftieth Street, Cleveland, Ohio. Morphine sulphate, drams 10. Sig.—Use as directed. Jin Fuey Moy. The drugstore notation being H-20465. 4 22 17.

Government also specifically offers the prescription which is a part of U. S. Exhibits Nos. 11 and 12, as follows:—Jin Fuey Moy, M. D. April 23, 1917. James E. Howard, 425 French Street, Erie, Pa. Morphine sulphate, drams 8. Sig.—Use as directed. Jin Fuey Moy. Notation of the Fleming Drug Company as follows: H-20487 4/23/17.

Government also specifically offers prescription which is a
72 part of U. S. Exhibits Nos. 11 and 12, as follows:—Jin Fuey Moy, M.D., April 23, 1917. David Costlow, 786 College Place, Johnstown, Pa., Morphine sulphate, drams 8. Sig.—Use as directed. Jin Fuey Moy. Fleming drugstore notation: H-20520, 4/23/17.

Government also specifically offers the following prescriptions, which forms part of U. S. Exhibits Nos. 11 and 12, as follows:—Jin Fuey Moy, April 23, 1917. Joe Richards, 431 West Glandon Street, Pittsburgh, Pa. Morphine sulphate, drams 8. Sig.—Use as directed. Jin Fuey Moy. Fleming drugstore notation H-20509, 4/23/17.

Also, prescription forming part of U. S. Exhibits Nos. 11 and 12, as follows:—Jin Fuey Moy, M.D., April 23, 1917. Charles Rice, 417 Fifth Avenue, Pittsburgh, Pa. Morphine sulphate, drams 7. Sig.—Use as directed. Jin Fuey Moy. Notation of the Fleming Drug Company: H-20525, 4/23/17.

Government also offers the following prescription, forming part of U. S. Exhibits Nos. 11 and 12:—Jin Fuey Moy, M.D., April 23, 1917. Maggie Block, 1002 Liberty Avenue, Pittsburgh, Pa. Morphine H. Tablets 1-4 grain. No. 4-500. Sig.—One t.d. Jin Fuey Moy. With a notation of the Fleming Drug Company as
73 follows: H-20526, 4/23/17.

Government also offers specifically a prescription forming part of U. S. Exhibits 11 and 12, as follows:—Jin Fuey Moy, M.D. April 25, 1917. George Cole, 316 Princeton Place, Pittsburgh, Pa. Morphine sulphate, drams 12. Sig.— se as directed. Jin Fuey Moy. The following notation of the Fleming Drug Company: H-20567, 4/25/17.

Also specifically offers the following prescription forming part of U. S. Exhibits Nos. 11 and 12: Jin Fuey Moy, M.D., April 25, 1917.

Edward M. Fitzpatrick, 116 Auburn Street, Pittsburgh, Pa. Morphine sulphate, drams 12. Sig.—Use as directed. Jin Fuey Moy. With the following drugstore notation: H-20568. 4/25/17.

Government also specially offers the following prescription, which forms part of U. S. Exhibits Nos. 11 and 12:—Jin Fuey Moy, M.D., April 25, 1917. Harry Pearl, 2431 Ellsworth Avenue, Pittsburgh, Pa. Morphine sulphate, drams 8. Sig.—Use as directed. Jin Fuey Moy. Drugstore notation: H-20585. 4/25/17.

Government also specifically offers from U. S. Exhibits 11 and 12, the following prescription: Jin Fuey Moy, M.D., April 26, 1917. John A. Kelly, 122 Thirteenth Street, Monrow (?) Mich. Morphine sulphate, drams 8. Sig.—Use as directed. Jin Fuey Moy. Notation of Fleming Drug Company as follows: H-20617. 4/26/17.

Government also specifically offers the following prescrip-
74 tion, which forms part of U. S. Exhibits Nos. 11 and 12:—Jin Fuey Moy, M.D., April 26, 1917. Stella Aarons, 519 Sixty-fifth Street, Cleveland, Ohio. Morphine sulphate, drams 12. Sig.—Use as directed. Jin Fuey Moy. The following notation of the Fleming Drug Company: H-20612. April 26, 1917.

Government also specifically offers the following prescription from U. S. Exhibits Nos. 11 and 12; Jin Fuey Moy, M.D., April 26, 1917, Emily Kate, 410 Fifth Street, Canton, Ohio. Morphine sulphate, 16 drams. Sig.—Use as directed. Addict. Jin Fuey Moy. Notation of Fleming Drug Company as follows:—H-20617. 4/26/17.

Government also specifically offers the following prescription which forms part of U. S. Exhibits 11 and 12:—Jin Fuey Moy, M.D. April 27, 1917. John Henry, 1732 Curtis Avenue, Cleveland, Ohio. Morphine sulphate, drams 12. Sig.—Use as directed. Jin Fuey Moy. Drugstore notation: H-20654. 4/27/17.

Government also specifically offers the following prescription from U. S. Exhibits Nos. 11 and 12:—Jin Fuey Moy, M.D. Irene Cox, 43 Chatham Street, Pittsburgh, Pa. Morphine sulphate, drams 8. Sig.—Use as directed. Jin Fuey Moy. Drugstore notation: H-20630. 4/26/17.

Government also specifically offers the following prescription forming part of U. S. Exhibits 11 and 12; Jin Fuey Moy, M.D., April
28, 1917. Henry McKnight, 48 Spear Street, Detroit, Mich.
75 Morphine sulphate, drams 12. Sig.—Use as directed. Jin Fuey Moy. Drugstore notation: H-20684. 4/28/17.

Government also offers specifically the following prescription from U. S. Exhibits 11 and 12—Jin Fuey Moy, M.D., April 28, 1917. James McLaughlin, 32½ Albert Street, Youngstown, Ohio. Morphine sulphate, drams 12. Sig. Use as directed. Drugstore notation: H-20723. 4/28/17

Government also specifically offers from Exhibits Nos. 11 and 12, the following prescription: Jin Fuey Moy, M.D., April 28, 1917. Margaret Murdock, 518 Ann Street, Pittsburgh, Pa. Morphine "H" tablets, Grains ⅛ No. "D." Sig.—One t.d. Jin Fuey Moy. Drugstore notation: H-20697. 4/28/17.

Government also specifically offers the following prescription forming part of Exhibits 11 and 12:—Jin Fuey Moy, M.D., April 29,

1917. Herman Weber, 910 Liberty Avenue, Pittsburgh, Pa. Morphine sulphate, drams 16. Sig.—Use as directed. Jin Fuey Moy. Notation of Fleming Drug Company; H-20756. 4/29/17.

It is admitted that in the prescriptions offered, the tablets No. "D" means 500, and "H" tablets means hypodermic tablets, and "One t.d." means one time a day, and "Three t.d." means three a day.

An adjournment was here taken until Tuesday, December 18, 1917, at ten o'clock A. M.

76 And now, Tuesday, December 18, 1917, trial resumed at ten o'clock A. M.

The Government offers specially in evidence order form M-761043, to the Hoffman-LaRoche Chemical Works of New York, calling for 300 ounces of morphine sulphate, duplicate order form for opium, etc., under Act of Congress approved December 17, 1914, Twenty-third District of Pennsylvania. No. 761,043. Registry No. 708. Joseph Fleming & Son Company. A. A. Staley, Name of Purchaser. November 25, 1916. To Hoffman-LaRoche Chemical Works, New York. Series 1915. "Please ship goods by P. R. R. Frt. December 20, 1916, as follows." And under "Specific Description of Articles," "300 oz. morphine sulphate in $\frac{1}{8}$ oz." Counsel for Government calling special attention to the fact that in the order forms from K-682,601 to K-682,610, the name of the purchaser is given as Joseph Fleming & Son Co., John C. Larkin.

That the same is true of order forms numbered from K-682,631 to K-682,640.

And also order forms K-682,811 to K-682,620.

And that the same is true of order forms K-682,621 to K-682,630.

And also that the same is true of order forms K-862,591 to K-862,600.

Counsel also desire to call special attention to the fact that in order forms M-761,061 to 761,070, under the name of purchaser of the narcotics covered therein is given the Joseph Fleming & Son Company, A. A. Staley.

77 That the same is true of order forms M-761,041 to M-761,050.

Also that the same is true as to order forms M-761,051 to M-761,060.

And also as to order forms M-761,071 to M-761,080.

It is agreed that the order forms offered in evidence as United States Exhibits 1-*a* to 1-*n* embrace the order forms referred to and set forth in the Second Count of the Indictment at No. 23 May Term 1917, and also as set forth in the First Count of the Indictment at No. 90 November Term, 1917; and that these order forms show the name of the purchaser, the kind of drug, and the amount, substantially the same as recited in the aforesaid counts.

Mr. Stadtfeld: This is agreed to with the understanding that *is* is objected to, as being incompetent, irrelevant and immaterial.

By the Court: The objection is overruled and an exception noted for the defendants.

Prof. HORATIO C. WOOD, JR., called on behalf of Government, testified as follows:

Direct examination.

By Mr. Henry:

Q. Doctor, is there a generally accepted practice among physicians as to prescribing morphine sulphate for an addict?
A. Yes, sir.

78 Objected to by counsel for defense, for the same reasons as objected to at previous hearing, as generally incompetent and irrelevant to the question at issue.
Objection overruled, and exception noted for defense.

Mr. Henry:

Q. You may answer that yes or no.
A. Yes.
Q. What is that practice?

Mr. Marshall: I ask leave to cross examine the witness before he answers that question.

Q. Didn't you testify yesterday that there was no such practice?
A. No, sir, I did not.
Q. Among what physicians do you say that you know this is the practice?
A. Physicians in general that I come in contact with.
Q. Where?
A. Well, they are mostly in Philadelphia where my home is, but I have talked with physicians elsewhere, and have read literature written by doctors elsewhere.
Q. What doctor do you know in this district who treats addicts?
A. I don't know just what this district embraces.
Q. What?
A. I say I don't know just what this district embraces.
Q. Well, the Western District of Pennsylvania.
A. You will have to pardon me, but I don't know what the Western District of Pennsylvania is.
Q. Well, then, say Allegheny County.
A. I don't know any physician in this county who, I know of my own knowledge, treats morphine addicts.

79 Q. Do you know what the generally accepted practice in Allegheny County is as to the treatment of addicts?
A. Except in so far as a generally accepted practice in one portion of the State, I suppose, would apply to the State in general.
Q. Then you were testifying as to what the general practice was in around Philadelphia?

Mr. Humes: I object to counsel putting words of that kind in the mouth of the witness.

Mr. Marshall: I am cross examining, if the Court please, and I have a right to do that.

A. Well, as I have said before, of course my personal acquaintance with physicians is generally in Philadelphia, but there is in the medical profession a common standard or a common practice which is pretty well established all over the United States.

Q. You only know that from reading, do you?

A. Yes. Occasionally I have talked to other men, but chiefly from reading.

Q. What ones did you ever talk to in or about Allegheny County, as early as last May?

A. I don't think I ever talked to any physicians from Allegheny County.

Q. You never did.

A. That is—on that subject.

Q. Did you ever read any article on this subject by any physician in the Western part of Pennsylvania?

A. No, I don't think I have. Not that I recall at present.

Q. Do you know whether there was any such custom or practice as to the treating of addicts in the western part of Pennsylvania in May last?

Objected to by counsel for the Government, as entirely incompetent.

80 By the Court: That might be, but he can make the inquiry.

A. Not of definite absolute knowledge, but my knowledge of the medical profession in general presumes that the practice in Allegheny County is very similar to what it is in Philadelphia County.

Mr. Marshall:

Q. Presumes?

A. Yes.

Mr. Marshall: I object to the testimony, as incompetent, irrevelant and immaterial, and to the witness, as incompetent to give the general practice in this district; and for the further reason that the witness disqualified himself yesterday to testify to this matter.

By the Court: The witness having testified that there is a generally recognized practice among physicians generally with reference to the prescribing of morphine to addicts, it has qualified him, I think, to state what that general practice is. The objection is therefore overruled, and an exception noted to the defendant.

Mr. Henry:

Q. What is that practice, doctor?

Objected to by counsel for defense, as immaterial, irrevelant and incompetent to the question at issue; and the competency of the wit-

ness is also objected to, to testify as to a general practice in this district.

81 Objection overruled and exception noted to defense.

A. Not to prescribe morphine for an addict, except that addict be under the control of a physician; that is, except there be some way for the physician to regulate the time at which the addict may take that morphine and the amount he may take aside from his own usage.

Q. Doctor, is there an accepted practice as to charges made by physicians for writing prescription?

Objected to by counsel for defense, as incompetent, immaterial and irrelevant; objection is also made to the competency of the witness.

By Mr. Humes: If the Court please, so that you may understand this, this testimony is perhaps a little bit out of order; but, because we now have the witness on the stand, we want to make the inquiry at this time.

Mr. Marshall: I am not objecting to the order of the testimony.

By the Court: I think I will hear it. The objection is overruled, and exception noted to the defendant.

At the request of counsel for defense, it is again noted that all of this testimony along this line is taken under objection made by defense, with exception granted.

Mr. Henry:

Q. You may answer the question.

Question read.

A. Yes, sir.

Q. What is that practice?

82 A. The practice is that the physician charges for his services, and his charges will be the same whether he furnishes one or two or three prescriptions or none at all.

Q. In this general practice, doctor, would the amount of the drug prescribed in the written prescription affect the charges?

A. To the patient?

Q. Yes.

A. No, sir.

Q. Would you put into the hands *of* a patient a dram of morphine sulphate?

Objected to by counsel for defense.

By the Court: I think that would hardly be competent.

Question withdrawn.

Cross-examination.

By Mr. Marshall:

Q. Doctor, when you speak of the general practice of treating addicts, do you speak of the general practice where the physician is attempting a cure or where the physician is attempting to give relief to an addict, so that the addict can continue at his work or daily employment?

A. Well, you are not treating an addict, unless you are making an effort to cure him.

Q. Then, if an addict were to come to you suffering with the symptoms from which you say addicts suffer upon a withdrawal of the drug—and when I say "to you," I don't mean to you, I mean to one of the profession—the practice would be not to treat him or not to give him the drug to relieve him or perhaps save his life; but if you couldn't keep him under your direct supervision, you would let him die or suffer these terrible pains.

A. No, I would send him to a hospital.

83 Q. Suppose that a man is a man supporting a family.

A. Well, I can hardly suppose a confirmed morphine addict supporting a family.

Q. Do you or don't you know this to be a fact, that there are hundreds of men addicted to the use of morphine in Allegheny County at the present time who are daily working, supporting themselves and their families?

A. I do not know that to be a fact, no.

Q. You do not?

A. No, sir.

Q. Well, what would be the practice among physicians—or what is the practice among physicians as to the treatment of addicts who are working?

A. They would say, "You must go to a hospital to be cured of that habit."

Q. And then you would give them no relief—is that correct? Is that the practice in the "City of Brotherly Love?"

This is objected to by counsel for the Government, as entirely improper.

By the Court: I think he may inquire this, in view of the testimony of the witness; I think it is within a fair range of cross examination.

A. If the patient refused to go to a hospital or to be put under proper treatment.

Mr. Marshall:

Q. Then the practice is, if the patient were in such a condition that he was suffering these terrible pains that you speak of, that you would not give him any relief unless he would go to a hospital?

A. If the patient is so seriously ill as that, he should be in a
84 hospital to get proper supervision. He is not a fit patient to be at large.

Q. Do you or don't you know that a large number of addicts are working and have been working for years in responsible positions?

A. There are a few men who take small quantities of morphine and are able to continue with their work, but the great majority of addicts very soon become unable to carry on their work.

Q. Do you give your testimony from general observation, from reading, or from your own personal knowledge?

A. Both from reading and from my own personal knowledge.

Q. How many addicts have you known?

A. I can't remember exactly, but I would say, at a guess, somewhere in the neighborhood of thirty or forty.

Q. And the ones you know are ones who have been addicts for years and years, are they not?

A. Some of them. I have known them all the way from a few months up to many years.

Q. But is it not a fact that there are many users of morphine who have used it for years without anyone knowing anything about it?

A. There are some.

Q. Well, of those thirty, how many are there?

A. Only one that I recall at this moment.

Q. Are there not a great many addicts who have used morphine by reason of incurable diseases, such as tuberculosis and cancer?

A. Well, in that case, they need the morphine for the relief of the pain of the cancer.

Q. Well, how about the case of tuberculosis, for the relief from a cough?

85 A. I don't think a man with tuberculosis, whose cough is so severe that he needs to continually use morphine, would live long enough to become an addict. There may possibly be one or two tuberculosis patients of that sort, but they are very rare.

Q. What did you mean yesterday when you say that morphine was used to relieve a cough.

A. I meant it is used to relieve a cough.

Q. I know that. But, doctor, you have been so fair, that I didn't think you would make such an answer as that.

A. Well, I don't know really what your question means.

Q. Well, yesterday you said that morphine was used to relieve a cough. What did you mean? Did you mean to relieve a cough of tuberculosis?

A. It might be a cough due to tuberculosis or due to influenza or due to heart disease, or due to anything.

Q. That is what you meant yesterday?

A. Yes, sir.

Q. Then, when you testify as to the general practice in treating addicts, you are testifying from your own personal knowledge as to the treatment in Philadelphia?

A. And from——

Q. Well, I will come to that, but that is part of it?

A. That is part of it, yes.

Q. And so far as the balance of it is concerned, you only testify because of your reading?

A. Yes, sir.

Q. And so far as the Western District of Pennsylvania is concerned, you only testify to the general custom of treating in that district from what you know as to the general custom in the balance of the United States?

A. Yes, sir.

80 Q. Not from any special knowledge you have from any paper written by any doctor who practices in the western part of Pennsylvania, or from any personal knowledge you have as to the custom in western Pennsylvania?

A. It is pretty hard to say yes or no to that question. But I agree with you, as I understand the intent of the question.

Redirect examination.

By Mr. Henry:

Q. Doctor, are the laws of the human body and the effect of narcotic drugs such as morphine sulphate on the human body any different in western Pennsylvania than in any other section of the United States?

Counsel for defense object to the competency of the witness to reply to that question. The jury knows that, as well as anybody else. The witness was asked as to the custom of the treating of addicts in this district.

By the Court: Of course, that is a self-evident question.

Mr. Marshall:

Q. And your testimony as to the charges of physicians, is that the custom in this district, or are you testifying as to a general custom in Philadelphia?

A. Well, anything which was a wide departure from the accepted custom all over the United States would certainly be known. For instance, a question like that would be known to the authorities of the State Medical Association. And if there was a little exception in Allegheny County, it would certainly be known to the medical profession of the State.

Q. It is also a custom among doctors not to advertise, isn't it?

A. No, sir. There are very narrow restrictions to the way in which doctors can advertise.

87 Q. Well, I mean that he can't put a public advertisement in any paper and belong to any of the medical societies?

A. He can put his card in medical journals.

Q. But I mean in daily newspapers?

A. In some sections of the country, he can. In Philadelphia it would not be considered proper practice, but in certain western parts of the country it is done.

Q. Well, all through Pennsylvania, it is considered bad practice, isn't it?

A. Yes, it is generally so considered.

Q. Don't you expel men from your associations if they do it?

Objected to by Counsel for the Government, as immaterial, irrelevant and not proper cross examination.

By the Court: I think you are getting a little wide of the question, Mr. Marshall.

Mr. Marshall: I have a right to test the witness.

By the Court: What perhaps might be the case in one section of the country might not be the same in another section. The objection is sustained, and an exception noted to the defense.

Mr. Marshall:

Q. Does the addict have any symptom, does he usually have any symptom by which you can determine, without asking the addict, whether he is or is not an addict?

A. You can make a probably diagnosis, but, without observation over a period of time, it would be very difficult to make an absolutely positive diagnosis of a morphine addict.

Q. Doesn't the eye show?

A. The eye will show the effects of taking a single dose of morphine. But if an ordinary person takes a certain quantity
88 of morphine, he gives the same character of eye as the addict shows when he has taken a dose of morphine. All that the eye shows is that he has taken morphine.

Q. What does the eye show?

A. It shows a narrowly contracted pupil.

Q. Did you ever examine the eye of an addict?

A. Yes.

Q. Doesn't the internal cornea show yellow?

A. Why, sometimes; but lots of other people have yellow characteristics of the cornea. It is not a characteristic of morphine addicts alone.

Q. Have you ever made any special study of the eyes of addicts of morphine.

A. Except in so far as my general examination of the patient goes I am not an eye specialist, if that is what you mean.

Q. Does the use of morphine show in the cornea from a single dose of morphine, or from a few doses, or is it shown in the contraction of the pupil?

A. It is shown in the contraction of the pupil.

Q. I believe I did ask you this question. When there is a continued use of morphine, so that the party using it is called an addict, is it not shown in the internal cornea of the person habitually using the drug?

A. Yes, very frequently. But I think that is on account of the digestive disturbances which are produced by the continued use of

morphine. Digestive disturbances generally will produce a yellowish tinge to the cornea. That is very common.

Q. Then your answer is yes?

A. Yes, generally.

88½ *Testimony of W. T. Truxton & John A. Frew.*

Pages of Testimony 81 to 143, Inc.

89 W. T. TRUXTUN, called on behalf of Government, sworn, testified as follows:

Direct examination.

By Mr. Henry:

Q. Where do you live?

A. Norfolk, Virginia.

Q. What is your business?

A. I am Narcotic Inspector, Internal Revenue Office.

Q. How long have you been a Narcotic Inspector for the Internal Revenue Office?

A. About two years.

Q. Were you in the Government in April, 1917?

A. Yes, sir.

Q. Where were you in the latter part of April of that year?

A. In Pittsburgh.

Q. Were you with Mr. Oyler, who just left the witness stand, at any time in April, in Pitssburgh?

A. Yes, sir.

Q. Where?

A. Well, I was with Mr. Oyler, accompanied Mr. Oyler, on every occasion that he visited Dr. Moy's office, stayed on the outside.

Q. Did you accompany him to Dr. Moy's office on April the 25th?

A. Yes, sir.

Q. How long was Mr. Oyler in there?

A. The last time—Mr. Oyler went on three occasions; on the first two occasions, the doctor was out. On the last occasion, at which he obtained a prescription, Mr. Oyler entered at 1:35 and left at 1:55.

Q. That was on April 25th?

A. Yes, sir.

Q. That was twenty minutes, then?

A. Yes, sir.

Q. Did you accompany him to Fleming's drugstore that day?

90 A. Yes, sir.

Q. I show you Exhibit No. 13, being prescription of Dr. Jin Fuey Moy, of April 25th, and ask you if Mr. Oyler came out of Dr. Moy's office with that prescription?

A. He did, yes, sir.

Q. Have you any notation there?
A. Yes, I have my own private identification mark on it.
Q. Did you accompany him to the drugstore with that prescription?
A. I did .
Q. Did you see him go in there?
A. Yes, sir.
Q. How long was Mr. Oyler in there?
A. I can tell that by referring to my private notes, if I may. He went into the Fleming Drug Company at 2:10 and came out of the Fleming Drug Company at 2:17.
Q. You were in there seven minutes?
A. Yes, sir.
Q. And did he get the four bottles of morphine sulphate that are marked Exhibit 14?
A. Well, I will have to look at the bottles to know that.

(Bottles handed witness.)

A. Yes, sir.
Q. How do you tell that?
A. By my own handwriting on the labels.
Q. Were you with Mr. Oyler on the second visit, on April 28th?
A. At Dr. Moy's?
Q. Yes, sir.
A. Yes, sir.
Q. How long was Mr. Oyler in there at that time
A. Mr. Oyler entered Dr. Moy's office at that time, the second time, at five minutes to five.
Q. And when did he leave?
A. At five o'clock.
Q. He was in there five minutes?
91 A. Yes, sir.
Q. And he came out with the prescription marked Exhibit 17?
A. Yes, sir.
Q. Did you accompany him to Fleming's Drugstore at that time?
A. Yes, sir.
Q. How long was he in the drugstore on the occasion of this visit?
A. That is, on the 28th?
Q. Yes.
A. I haven't got the time on that. I didn't take the time on that.
Q. Were you with him on the occasion of the third visit?
A. To Dr. Moy's?
Q. Yes.
A. Yes, sir.
Q. Did you see him get a prescription for five drams, or come out with a prescription for five drams?
A. I saw him come out, yes, sir.
Q. Did you accompany him from Dr. Moy's office when he got this last prescription?

A. Yes, sir.
Q. Where did he go?
A. We brought the prescription to the District Attorney's Office.
Q. Where did you start from to get that prescription?
A. That last prescription?
Q. Yes.
A. Well, if I remember correctly, I was of the opinion that we had obtained enough prescriptions from Dr. Moy, but if my recollection is correct, we got the third prescription at the instance of Assistant District Attorney McGill, and brought it back to the District Attorney's Office, and at that time Mr. Humes instructed us not to have it filled.
Q. Did you ever go to the Fleming drugstore yourself, go inside the store?
92 A. Yes, sir.
Q. What happened there?
A. Well, I went——
Q. Well, first fix the time.
A. Well, the first time I went into the Fleming drugstore was on April the 25th. I went in there and brought some shaving soap

Counsel for defense ask for an offer.

Counsel for Government propose to prove by the witness on the stand, for the purpose of showing a combination between the Joseph Fleming & Son Company drugstore and Jin Fuey Moy, that on the 26th day of April, 1917, the witness asked a clerk in the store of Joseph Fleming & Son Company where he could get morphine, and was directed by the clerk to go to the office of Dr. Moy; that the clerk wrote the address of Dr. Moy on a piece of paper, which the Government proposes to offer in evidence, for the purpose of showing a combination.

Mr. Marshall: That is objected to, as incomplete and irrelevant, for the reason that the fact that a clerk gave him the name of Dr. Moy, or any other doctor, or his address, does not in any way tend to prove a combination or conspiracy between any of the officers of Joseph Fleming & Son Company and Dr. Moy; and this particularly in view of the fact of the large number of prescriptinns that had been filled at the drugstore of Joseph Fleming & Son Company, which prescriptions are the prescriptions of Dr. Moy for morphine.

By the Court: Joseph Fleming & Son Company, a corporation, being named as the defendant, the corporation must necessarily act through its officers and agents and I think the declara-
93 tions or actions of an agent, in carrying on the business in question would be competent, in reference to the drugs which are the subject of controversy. The objection is therefore overruled, and an exception noted for the defendants.

Mr. Henry:

Q. Did you visit the store of Joseph Fleming & Son Company on the 26th of April, 1917?

A. Yes, sir.

Q. State what took place there.

A. I went into the Fleming drugstore about ten minutes past eight o'clock, and approached Mr. Studeny over there; I waited around a half minute, and young Mr. Studeny came up to wait on me. And I said to him, "Can I get any morphine here?" And he said, "Sure, if you have a ticket." And I said, "where can I get a doctor who will write me a ticket?" And he said, "Go to see Dr. Moy, and if you can't get him, go to Dr. Trader." And I said, "Where does Dr. Moy live?" and the clerk walked with me to the door and pointed with his hand, and said, "Go up the first street, which is Fourth Street, and turn to the left and pass the Post Office." He said, "You had better write that down." I said, "I have nothing to write it with." And he then proceeded to the counter and tore off a piece of paper and wrote the doctor's name and address on it.

Paper produced and marked U. S. Exhibit No. 18 of this date.

Q. I show you Government Exhibit No. 19, being a slip of paper with "Dr. Moy, 308 Grant St." on it, and I will ask you if this is the piece of paper that was given you at the store of Joseph Fleming & Son Company by Mr. Studeny?

A. Yes, sir.

U. S. Exhibit No. 19 offered in evidence by counsel for the Government.

94 Mr. Marshall: It is understood that this is all under the same objection?

By the Court: Yes, with the same ruling, and exception noted.

Mr. Henry:

Q. Was anybody with you when you went down to the store?

A. Mr. Oyler was standing on the outside.

Q. What did you do with the piece of paper when you came out?

A. I turned the paper over to Mr. Oyler, and he marked it for identification, and it was brought up to the Internal Revenue Agent here, and it was sealed up in an envelope and put in the safe.

Mr. Marshall:

Q. Are you sure that he said "Ticket" and not "prescription"?

A. I am positive of that.

Q. Well, you understood that he meant "prescription" when he said "ticket"?

A. Yes, sir.

Q. At what time was that third visit to Dr. Moy's office?

A. Made by Mr. Oyler, you mean?

Q. Yes, when you waited outside?

A. He went at five and came out at 5:10.

Mr. Henry:

Q. Did you ever purchase any morphine sulphate at Fleming's drugstore?

A. Yes, sir.
Q. On what date?
A. On April the 27th.

Paper produced and marked as U. S. Exhibit No. 19 of this date.

95 Q. I show you Government Exhibit No. 19, being a prescription of Dr. E. J. Trader's, to William Truxtun.
A. I had that filled at the Fleming drugstore, yes sir.
Q. For how much?
A. One dram.
Q. You got this filled on the 27th of April, 1917?
A. Yes, sir.
Q. How much did you pay for that prescription?

Objected to by counsel for defense, as irrelevant, incompetent and immaterial.
Question withdrawn.

Q. How much did you pay Fleming & Sons Company for the one dram of morphine sulphate that was filled on this prescription?

Objected to by counsel for defense, as incompetent, irrelevant and immaterial.
Objection overruled and exception noted to defense.

A. $2.00.

Cross-examination.

By Mr. Marshall:

Q. Which druggist filled you the prescription?
A. Mr. Studeny.
Q. That prescription was furnished you by a registered doctor?
A. The prescription wasn't furnished me at all; I mean, by a doctor. The prescription was given Mr. Oyler.
Q. Well, you took it—it has your name on it—William Truxtun?
A. Well, I think that was done to find out whether this doctor would write prescriptions for one man and the prescription could be taken there by somebody else and filled by the Flaming Drug Company.
Q. Well, this prescription was made for a William Truxtun?
A. Well, I don't dispute that at all, sir.

96 Q. I am asking simply what the prescription shows. It is William Truxtun, and that is your name?
A. William T. Truxtun is my name.
Q. And the address given 629 Sixth Avenue, is that where you lived, where you were stopping, at a hotel on Sixth Avenue?
A. I think that is probably the correct number.
Q. What I meant was, this is a regular prescription of a registered doctor?
A. Unquestionably, yes.
Q. And when I say "this" I mean Exhibit 19?
A. Yes, sir.

Mr. Henry:

Q. What inquiries, if any, did the clerk make of you when you presented this prescription, with respect to your name, and so on?
A. He asked me no questions at all; made no inquiries.

JOHN A. FREW, called on behalf of Government, sworn, testified as follows:

Direct examination.

By Mr. Henry:

Q. Where do you live?
A. I live in Cleveland, Ohio.
Q. Whereabouts in Cleveland, Ohio?
A. 14217 Ardenell Avenue.
Q. How long have you lived there?
A. Well, ever since I was one year old, in Cleveland; not exactly at that address.
Q. Did you ever come to Pittsburgh to visit Dr. Moy?
A. I did, sir.
Q. What prompted you to come to Pittsburgh to visit Dr. Moy?
A. To purchase morphine.
Q. How did you find that Dr. Moy was writing prescriptions for morphine.

97 Objected to by counsel for defense, as incompetent, irrelevant, and immaterial.

By the Court: Yes, you might introduce hearsay in that way.

Question withdrawn.

Mr. Henry:

Q. When did you first come to Pittsburgh?
A. On March 14, 1917.
Q. Did you go to Dr. Moy's office on March 14, 1917?
A. I did, sir.
Q. Where is the office located?
A. Why, it is on Fourth Avenue, I am pretty sure. I was a stranger in this city, but, by directions, I found his office.
Q. What took place there? First, fix the time of day that you went there.
A. It was around eleven or twelve o'clock.
Q. What took place there?
A. Well, I went into the doctor's office, and there was one person there ahead of me, and I had to wait for three or four minutes for the doctor. I told the doctor that I was a user of morphine, and that I would like to have a prescription made out, so I could purchase the same.
Q. What, if anything, was said by the doctor in response to that?
A. He asked me where I lived, and I told him I lived out of the

city. And he asked me how much morphine I was using, and I told him about eight grains a day.

Q. What, if any, examination was made by the doctor at that time?

A. The doctor told me to take off my glasses and looked at my eyes, and then after he looked at my eyes, he asked me what way I used morphine, and I told him hypodermically, and he looked at my arm.

98 Q. Then what took place?

A. Then he asked me how much morphine I wanted.

Q. What did you say?

A. I told him all I could get.

Q. Did he write a prescription for you?

A. He did. He wrote two.

Q. He wrote two prescriptions?

A. Yes, sir.

Q. What name did you give Dr. Moy on the occasion of this visit?

A. On what prescription? I gave him two names.

Q. What did you tell him your name was?

A. John Henry.

Q. I show you a prescription in a book, which is U. S. Exhibit No. 10, a prescription under date of March 14, 1917, John Henry, 113 Smithfield Street?

A. Correct.

Q. Signed, Dr. Jin Fuey Moy.

A. This is the prescription.

Q. And for what amount is that prescription?

A. That was for 10 drams, ten 8-ounce bottles.

Q. Did you get any other prescription from Dr. Moy at that time?

A. I did.

Q. What amount?

A. Six 8-ounce bottles; 8 ounces.

Q. Under what name?

A. Helen Henry.

Q. How did the name Helen Henry come to be used in the prescription?

A. Well, I told him that was my wife.

Q. And what did the doctor say, if anything?

A. He says, "I can't put that same address for your wife as the one on this other prescription, for the simple reason that your wife isn't in the city."

99 Q. Then he suggested the address, do I understand you?

A. Yes, sir.

Q. What is the address given for Helen Henry?

A. 1562 Curtis Avenue, Cleveland, Ohio.

Q. And this prescription is for how much?

A. That was for six drams.

Q. Was there any person, male of female, present with you at the time you received these prescriptions?

A. No, sir.

Q. In the prescription in the name of John Henry, what address is given?

A. 113 Smithfield Street.

Q. How did you get the address 113 Smithfield Street?

A. Well, I told the doctor that I was from out of the city, and he said, "You will have to have a city address." I told him that I was a stranger in the city and I didn't know of any city address." He says, "Didn't you stay at a hotel last night?" I says, "No." He says, "Well, I will make this out 113 Smithfield, and that's a hotel, and say you stopped there last night."

Q. What was said after you got the prescription by the doctor with reference to getting it filled?

A. Why, it was myself. I asked the doctor where I would get it filled. He says, "The Fleming Drug Company." And, of course, I didn't know where that was, and I asked the doctor for directions, and he gave me directions, and I says to him, I says, "Hadn't you better telephone down and confirm these prescriptions, so there won't be no trouble." He says, "Oh, never mind; we do business together; we understand each other."

Q. Did you go down to the store of Fleming & Son Company?

A. I did, sir.

Q. What did Dr. Moy charge you for these prescriptions?

A. One dollar for each eighth of an ounce; that would be $16 for both prescriptions.

100 Q. $16 for the two prescriptions?

A. Yes. $10 for one and $6 for the other.

Q. Did you present the two prescriptions — the Fleming drug store?

A. I did, sir.

Q. At the same time?

A. At the same time.

Q. Who were they presented to?

A. A young gentleman who was clerking there, with light hair. I don't know his name.

(Mr. Studeny was here asked to stand up.)

Q. Is this the clerk?

A. Yes, sir.

Q. What, if any, questions were asked by Mr. Studeny?

A. No questions whatever. He asked if I had money enough to pay for them.

Q. What did you say?

A. I said why, certainly; that I wouldn't be down there if I didn't have the money.

Q. And did he give you the sixteen bottles?

A. He did, sir.

Q. At one time?

A. Yes, sir.

Q. In how many packages?

A. Two packages.

Q. What did he charge you?

A. $2.10 an eighth.

Q. And the total amount was what?

A. $33.60.

Q. Did he charge the same for the morphine sulphate filled on the prescription with the Pittsburgh address as he did for the one with the Cleveland address?

101 A. Yes, sir, he charged me just exactly the same.

Q. What did you do with those sixteen bottles of morphine sulphate?

Objected to, as irrelevant, immaterial and incompetent.

By the Court: What do you propose to prove?

Mr. Henry: Well, we propose to prove by the witness on the stand that when he got these sixteen bottles, he was giving it to other people; that he was buying in wholesale quantities for others.

By the Court: The objection is overruled, and an exception noted for defendants.

A. Some I used myself, and some I gave away.

Mr. Henry:

Q. Did you go to Cleveland after you got the sixteen bottles

A. I did, sir.

Q. Did you come back to Pittsburgh after March 14th?

A. I did, sir.

Q. Can you recall the time of the next visit?

A. No, I can't just exactly tell the date, but it was within the period of a week or ten days, maybe sooner.

Q. Did you go to Dr. Moy's office?

A. I did, sir.

Q. Was he at home?

A. No, I don't think the doctor was at home the second time I came there.

Q. Did you call at the drugstore of Fleming & Company?

A. I did.

Counsel for defendants object, and ask for an offer.

Mr. Henry: Counsel for the Government propose — prove
102 by the witness on the stand that the witness, on the occasion of his second visit, on or about March 19, 1917, called at the store of Joseph Fleming & Son Company, and talked with Mr. Arnold Staley, Manager of Joseph Fleming & Son Company, and that the witness said that he couldn't lay around Pittsburgh and wait until Dr. Moy returned, and that Mr. Staley directed him to go to Dr. E. J. Trader, and told the witness the location of Dr. Trader's office; that Arnold A. Staley advised the witness to give his address as the Lincoln Hotel, Pittsburgh, Pa.; that the witness followed these directions and brought back two prescriptions from Dr. Trader's office, one for Frank Keith, for four drams, and one for Mrs. Keith for three drams; and that these prescriptions were presented at the drug store of Joseph Fleming & Son Company, and that both prescriptions were filled at the same time by the direction of Mr. Staley;

For the purpose of showing that the drugs purchased on these order forms, set out in Count Two of the Indictment at No. 23 May Term, 1917, and Count One of the Indictment at No. 90 November Term, 1917, were purchased by the Joseph Fleming & Son Company for the purpose other than the use, sale and distribution of said drugs in a legitimate business.

Mr. Marshall: This is objected to, as incompetent under the pleadings in this case, and the indictment; and objected to generally, as irrelevant and immaterial.

Mr. Dunkle: And especially, as attorney for Dr. Moy, we object to it, as not anything relating to Dr. Moy.

103 Objection overruled, and exception noted for defense.

Mr. Henry:

Q. What took place there on the second visit?

A. Well, I asked one of the men that kept the place where I could get some morphine.

Q. Do you see the man in the courtroom?

A. Yes, the man sitting right back of that gentleman with the glasses.

Q. Is that the man?

A. Yes, that is the man—(indicating Mr. Arnold Staley).

Q. What took place?

A. I asked him where I could get some morphine, that Dr. Moy wasn't in, and I wanted to catch a train. He said, "Don't you know where Dr. Trader is? And I said no. And he told me where Dr. Trader was. And he told me not to use the out-of-town address, and I said, "where shall I use?" And he said, "well, use the Lincoln Hotel." So I went up as directed, to Dr. Trader's office and told Dr. Trader that a gentleman from Fleming's, one of the proprietors down there, had sent me up. That was the first time I ever went to Dr. Trader.

Two prescriptions produced and marked as U. S. Exhibits Nos. 20 and 21.

Q. I show you Exhibits 20 and 21, and ask you if those are the prescriptions you received from Dr. Trader?

A. They are, yes, sir.

Q. In what amounts?

A. One for four, and one for three drams.

Q. The four dram prescription is for whom?

A. For Frank Keith and the three is for Mrs. Keith.

Q. Did you bring these prescriptions to the Fleming & Company store?

104 A. I did, sir.

Q. To whom did you present them, if anyone?

A. I presented them to Mr. Staley, the gentleman who directed me to the doctor's office.

Q. And did you get the seven bottles?

A. He looked at them and called the clerk, and the clerk gave me the seven bottles of morphine.

Q. What clerk?

A. The same gentleman who waited on me the first time I was there.

Q. Did you present them both at the same time?

A. Yes, right together.

Q. And it was the blond clerk was it?

A. Yes, sir.

Q. What did they charge you per dram for the morphine at the Fleming drug store on those two prescriptions were presented?

A. $2.10 a dram.

Q. When did you next come to Pittsburgh?

A. I don't know. I came quite a few times there within a short time, and I don't exactly remember the dates.

Two prescriptions produced and marked as U. S. Exhibits 22 and 23.

Q. I show you Government Exhibits 22 and 23, Exhibit 22 being a prescription dated March 22, 1917, Helen Henry, 1532 Curtis Avenue, Cleveland, Ohio, for seven drams, and Exhibit — being a prescription dated March 22, to John Henry, 113 Smithfield Street, Pittsburgh, Pa. for seven drams.

A. No, that is 713 Smithfield Street.

Q. Have you seen those prescriptions before?

A. I have, sir.

Q. Where did you get them?

A. From Dr. Moy.

Q. On the date given in the prescription?

A. Yes, sir.

165 Q. What took place at Dr. Moy's at that time, if anything, when you went to get those prescriptions?

A. Well, I just went up and told him I wanted to get some morphine, and told him I wanted that amount, and he gave it to me.

Q. You told him you wanted that amount?

A. What is on the prescriptions, fourteen drams.

Q. What examination, if any, did Dr. Moy make at that time?

A. None whatever.

Q. What did Dr. Moy charge you for the two prescriptions?

A. Fourteen dollars.

Q. What did you do with the prescriptions?

A. Went from Dr. Moy's office down to the Fleming Drug Company.

Q. And did you present the prescriptions at the Fleming drug store?

A. I did, sir.

Q. Both at the same time?

A. Yes, sir.

Q. To what clerk?

A. Well, I don't remember exactly what clerk it was at that time.

Q. Were they filled?
A. Why according to this address, there was some question—he said, "That isn't the same address you had on the other prescription."
Q. What address have you reference to?
A. 713 Smithfield Street.
Q. The address on the other prescription was what?
A. 113.
Q. And did you get the fourteen bottles of morphine sulphate at this time?
A. I did, sir.
Q. What questions were asked you at the Fleming Drug Company's place about this address which you have mentioned?
A. Well, they told me it had went up fifteen cents a bottle, and asked me if I had enough money to pay for it.
Q. Was there anything else asked?
A. No.
106 Q. What did you do with the morphine secured on these prescriptions?
A. Some I used myself and some I gave to other people.

It is again noted that this testimony is being taken under the same objection as heretofore made by counsel for defense, with the same ruling, and exception noted to defendants.

Paper produced and marked as U. S. Exhibit No. 24 of this date.
Recess taken until 1:30 P. M.

107 Afternoon Session.

JOHN A. FREW, on stand.

Direct examination (resumed).

Mr. Henry:

Q. Mr. Frew, I show you United States Exhibit 24, being a prescription written by Dr. Jin Fuey Moy, under date of April 6, 1917, for 16 drams, and ask you if you have seen that prescription before?
A. I have, sir.
Q. Did you get that prescription from Dr. Moy?
A. I did.
Q. Under date of April 6th?
A. Yes, sir.
Q. Just tell us the circumstances of your getting that prescription.
A. Well, when I first went up to Dr. Moy on that date, I got two prescriptions for eight drams a piece, one for Helen Henry and one for John Henry.
Q. Do you remember the addresses that were given on those two prescriptions that you got on that date?
A. One was given at a Cleveland address and the other a Pittsburgh address.
Q. What was the Pittsburgh address?

A. 713 Smithfield Street. I took the two prescriptions to the Fleming Drug Company, and when I went in there, they looked at the prescriptions—Mr. Arnold Staley looked at the prescriptions, and told me he wouldn't fill any more under a Pittsburgh address; they were taking too big a chance, and I must go back to the Chinaman and tell him what he told me, and he would understand.

Q. Mr. Staley said the Chinaman would understand?

A. Yes, sir.

Q. What did you do?

A. I went back to Dr. Moy and told him what Mr. Staley told me.

168 Q. Then what happened?

A. He took the two prescriptions I had and wrote one for sixteen drams, the one there which was filled.

Q. The prescription for sixteen drams that Dr. Moy wrote is Exhibit 24?

A. Yes, sir.

Q. What did you do with it?

A. I took it back to the Fleming Drug Company.

Q. What was done with the two prescriptions for eight drams each that you brought back from the drug store to Dr. Moy?

A. After I gave them to Dr. Moy, I couldn't say.

Q. You didn't see them after you gave them to Dr. Moy?

A. No, sir.

Q. Did you get the sixteen prescription filled?

A. Yes, sir.

Q. Who filled it for you?

A. One of the two clerks; I am not positively sure which one it was.

Q. What did they charge you per bottle?

A. $2.25.

Q. What did Dr. Moy charge you for this prescription for sixteen drams?

A. Sixteen dollars.

Q. Mr. Frew, at the time you called at Dr. Moy's office on these dates you have mentioned, March 14th, up to April 6th, were you married?

A. No, sir.

Q. How did you come to use the name "Helen Henry," on these occasions?

A. That was by suggestion of the doctor.

Q. Mr. Frew, state whether or not any questions were asked of you at Fleming drug store when you presented the prescription for sixteen drams, as to what the morphine was for?

A. No, not as to what the morphine was for.

Q. What conversation, if any, or what questions, if any, were asked at this time?

A. Well, they always wanted to be sure that you had the money.

169 Q. I show you Government Exhibit 25, being a prescription of Dr. Moy, under date of April 20, 1917, to John Henry, for eight drams, and I will ask you if you have seen that prescription before?

A. Yes, sir.
Q. Who gave you that prescription?
A. Dr. Moy.
Q. What took place at his office when you presented that prescription?
A. Why, about the same as all the other times. I would just go and get them.
Q. What did he charge for that?
A. Eight dollars.
Q. Did you get it filled at Fleming's drug store?
A. I did.
Q. What did they charge you for a bottle on April 20th?
A. $2.25.
Q. I show you Government Exhibit 26, being a prescription of Dr. E. J. Trader, for five drams, under the name of Frank Keith, 2223 Jenny Lind Street, McKeesport, Pa. Have you seen that before?
A. I have.
Q. Did you get it from Dr. Trader?
A. Yes, sir.
Q. Did you present that prescription to the Fleming Drug Company?
A. I did.

Mr. Marshall: Will the Court please have it noted that this is taken under the same objection.
The Court: The objection is overruled and an exception noted to the defendant.

Mr. Henry:

Q. Did you get this prescription filled at Fleming's?
A. I did, sir.
Q. At the same time the one was filled for Johnny Henry for eight bottles?
A. Yes, sir.
Q. Were they presented to the same clerk?
110 A. Yes, sir.
Q. And you received the thirteen bottles?
A. I did, sir.

(Papers marked Exhibits 27, 28 and 29.)

Q. I show you United States Exhibit 27, being a prescription of Dr. Webber to John Craig, 9712 Jenny Lind Street, McKeesport, Pa., for four drams, and United States Government Exhibit 28, being a prescription of Dr. E. J. Trader to Frank Keith, 2223 Jenny Lind Street, McKeesport, Pa., for four drams, both prescriptions under date of April 27, 1917, and also a prescription of Dr. Jin Fuey Moy under date of April 27, 1917, to John Henry, 1723 Curtis Avenue, Cleveland, Ohio, for twelve drams, and I will ask you if you have seen those prescriptions before?

A. I have.

Q. Did you get those prescriptions filled at the drugstore of Joseph Fleming & Sons' Co.?

A. I did, sir.

Q. At one time?

A. At the same time.

Q. Did the same clerk wait on you?

A. He did, sir.

Q. Do you remember who it was?

A. Yes, sir.

Q. Who?

A. That tall light-haired gentleman; I don't know his name.

Q. Mr. Wylie?

A. No, it is not Mr. Wylie; it is the other gentleman—that gentleman over there.

Q. Mr. Stubeny?

A. Yes, sir.

Q. What did they charge you per dram for the morphine sulphate you secured?

A. $2.50.

Q. This time you secured how many drams?

111 A. Twenty.

Q. On three different prescriptions?

A. Yes, sir.

Q. With three names?

A. Yes, sir.

Q. What, if anything, was said by the clerk to you, with respect to the names being different.

A. Nothing whatsoever.

Q. How many packages were these twenty packages in?

A. In one box—the regular box that the morphine sulphate in eighth ounces comes in.

Q. They come in a box of twenty one-eighth bottles?

A. Yes, sir.

Q. Was there anything said at the store, in your presence, about you making use of different names?

A. There was at one time.

Q. When?

A. The time right after he wouldn't take the Pittsburgh address any more.

Q. Who wouldn't?

A. Mr. Arnold Staley.

Q. Then what was said?

A. He said I could use other names.

Q. He told you you could use other names?

Objected to as leading.

The Court:

Q. Just give the conversation?

A. He told me he wouldn't fill two prescriptions under the same

name, but he would fill them in different names. Those are exactly the words he used.

Mr. Henry:

Q. Did he say that before you presented the three prescriptions under different names?

112 A. Yes, sir; that is how I came to get three under three names.

Q. What did you do with the twenty bottles?

A. Some I used myself and some I gave away.

Cross-examination.

Mr. Marshall:

Q. What is your right name?

A. John A. Frew.

Q. Is that the name you are known by in Cleveland?

A. John A. Frew.

Q. Is that the name by which you are known in Cleveland?

A. That is my right name.

Q. Is that the name by which you are known in Cleveland?

A. It is my right name, sure.

Q. I didn't ask you that?

A. You did.

Q. I asked you if that is the name by which you are known in Cleveland?

A. Positively; yes, sir.

Q. You first went to Dr. Moy in March, you say?

A. I did, sir.

Q. What date in March?

A. The 14th.

Q. How did you fix that date?

A. How do I fix what date?

Q. The 14th of March?

A. Because it is on the prescription.

Q. That is the way you fix it?

A. Most certainly.

Q. And at that time the doctor you say examined you?

A. Slightly.

Q. Examined your eyes?

A. He did, sir.

113 Q. And your arm?

A. My one arm.

Q. What?

A. Examined my one arm.

Q. One of your arms?

A. Yes, sir.

Q. Did you use morphine?

A. I did, sir.

Q. Sir?
A. I did.
Q. And did you tell the doctor that you were only using eight grains a day?
A. That is all I told him.
Q. How much were you using?
A. Eight grains.
Q. Were you using more than eight grains?
A. No, sir.
Q. Just eight grains a day?
A. Yes, sir.
Q. How long had you been using it?
A. About two years and a half.
Q. How old are you?
A. Twenty-eight.
Q. What is your business?
A. I am shipping clerk and order clerk.
Q. Have you been employed all that time?
A. I have, sir.
Q. Worked regularly?
A. Yes, sir.
Q. And are you still using it?
A. No, sir.
Q. You have quit, have you?
A. I was cured.

114 Q. Now, the first time you came down to see Dr. Moy after he had made this examination, he gave you a prescription for yourself, under the name of John Henry?
A. He did, sir.
Q. Did he give you the name "John Henry"?
A. No, sir.
Q. Who gave you that name?
A. I gave him that name.
Q. You gave him that name—you assumed that name?
A. I did.
Q. For yourself?
A. For myself.
Q. Did he give you the name of Helen Henry?
A. Yes, sir.
Q. Didn't you say in your examination in chief, that you didn't know why you used that name, "Helen Henry," first?
A. Oh, no.
Q. You didn't say that when you first went on the stand?
A. No, sir.
Q. But you say Dr. Moy gave you that name?
A. Yes, sir; under his suggestion, is how I took the name.
Q. How did it come about? What was the suggestion?
A. I asked the doctor if there wasn't some way that I could get some more, and he said, "Are you married?" I said, "Sure."—I took his meaning—and he said, "Is your wife in the city?" and I said, "No, she is in Cleveland sick; she can't get here." And he said

"I can give you eight for her then." That is how I came to get that.

Q. Did you not bring a woman into Dr. Moy's office with you?

A. Never in my life.

Q. You did not?

A. Positively no.

Q. Didn't you bring a woman in, representing her to be your wife?

115 A. I told you I never brought a woman into his office.

Q. When did you first see Arnold Staley?

A. The first time I went to the Fleming Drug Company, he was in there.

Q. Did you talk to him on that occasion?

A. No, I don't think I did.

Q. Did you see any person except Arnold Staley and the Clerk?

A. Well, there may have been customers in there.

Q. I mean, any person connected with the drugstore?

A. Well, I wouldn't know who was connected with the drugstore. The first time I went there, I didn't know if Arnold Staley owned the place or if the man in the moon owned it. I didn't know him.

Q. What date was that?

A. March 14th.

Q. What conversation did you have with Mr. Staley that day?

A. None whatsoever.

Q. None at all?

A. No, sir.

Q. Who was your conversation with that day?

A. The clerk.

Q. With which clerk were you talking that day?

A. The gentleman sitting back over there.

Q. Mr. Stubeny?—Is that the man?

A. That's the one.

Q. What was said that day?

A. They asked if I had the money to pay for it, is all.

Q. That is all he asked you?

A. Yes, sir.

Q. You had two prescriptions?

A. Yes, sir.

Q. And had them both filled at the one time?

A. Positively, yes, sir.

Q. When was the next time that you went to the Fleming Drug Company?

A. The date on the prescription will give the date.

116 Q. Do you remember when it was, without the date on the prescription?

A. Not exactly, no. I had no reason then to remember those dates.

Q. Now, what did Dr. Moy say to you on the second visit?

A. Just asked me what I wanted and how much.

Q. The second visit that was, was it?

A. Yes, sir.

Q. That was your second visit to Pittsburgh?

A. Yes, sir, my second visit to Dr. Moy.

Q. Was he home that time—the second visit to Pittsburgh?

A. There was one time, I Ain't positively sure whether it was between the second and third, or the second and first visits, that Dr. Moy wasn't home. I could tell by looking at the prescriptions, because I could know.

Q. At any rate, when you came to see Dr. Moy when he was out of town, you went to the Fleming Drug Company?

A. I did, sir.

Q. To their place of business?

A. I did, sir.

Q. And you saw Mr. Staley that day?

A. I did.

Q. Did you have any talk with him on that occasion?

A. I did.

Q. Is that the first time that you had any talk with Mr. Arnold Staley?

A. Yes, sir.

Q. What was said at that time?

A. I told him Dr. Moy wasn't in town—or he wasn't in—he may have been in town. I was told at the office that he wouldn't be in until eight at night, and I didn't care to lay around from noon until eight, and I went to the drugstore ... I asked Mr. Staley whether there wasn't another place I could get a prescription.

Q. What did he say?

A. He said, Dr. Trader.

Q. And you went to Dr. Trader?

117 A. I went to Dr. Trader.

Q. Did he say anything else?

A. Yes, he said, "Tell Dr. Trader I sent you up."

Q. Did he say anything else?

A. That is all I wanted to know.

Q. I am not asking you if that is all you wanted to know. Did he say anything else?

A. That is all he told me.

Q. Did he tell you nothing else?

A. No.

Q. Did he tell you to use an out-of-town address?

A. Not at that time.

Q. What did he tell you about an address at that time?

A. Didn't tell me anything about an address.

Q. You are sure about that?

A. Yes, he did, too—He told me to use the Lincoln Hotel address.

Q. That is a home address?

A. Sir?

Q. That is a local address?

A. Yes, sir. That is the time I got the second prescription off of Dr. Trader. The first time I went to Dr. Trader and he told me to use the Lincoln Hotel ad-ress.

Q. That was March 19th, according to the prescriptions marked Exhibits 20 and 21, which were given to you under the names of Frank Keith and Mrs. Keith?

A. Yes, sir.

Q. And you say you didn't have a woman with you at Dr. Trader's office?

A. Positively no.

Q. He gave you the prescription, and you personally got the prescription filled, without having a woman with you?

A. Without anybody, not even a man, outside of a woman; just myself.

118 Q. When you went back to get these prescriptions filled, who filled them for you?

A. I don't know exactly which clerk it was.

Q What?

A. I couldn't say positively which clerk it was at that time; I didn't care who filled them, just so I got it was all I wanted.

Q. Didn't you testify this morning it was a blond clerk?

A. It may have been him.

Q. Did you mean that this morning, or do you remember testifying to that?

A. No, I don't.

Q. Is your memory any worse this afternoon than it was this morning?

A. I guess it — about as good.

Q. Didn't you testify it was the blond clerk?

A. If I did, then it was. I am not positively sure whether it was him or the other fellow.

Q. Were you positive this morning when you said it was the blond clerk?

A. I said I am sure. I am not positive now. It was either one of the two.

Q. Then the next visit you made you went to Dr. Moy, did you?

A. Not that date.

Q. The third visit, you say Dr. Moy wasn't away?

A. Then I went to Dr. Moy.

Q. You again gave the names of Helen Henry and John Henry?

A. Yes, that is the only name I ever gave to Dr. Moy.

Q. He made no examination of you?

A. Not at that visit.

Q. And you didn't have a woman with you, I believe you have said you never had a woman with you in Dr. Moy's office?

A. That is just what I said.

Q. Who filled these prescriptions for you?

A. It was the blond clerk.

Q. You are sure of that, are you?

A. Yes, sir.

119 Q. Did you see Mr. Arnold Staley on that occasion?

A. I may have.

Q. What?

A. I may have. I seen him on pretty near every occasion.

Q. If you saw him on that occasion, did you have any talk with him?

A. What date is that?

Q. That is the time you got two prescriptions, March 22nd.

A. Calling for how much morphine?
Q. Seven drams for you and your wife Helen.
A. What is the address of Helen Henry's prescription?
Q. They are both for 713 Smithfield Street, I Believe.
A. No, sir, they are not.
Q. Helen Henry is for—how do you know they are not?
A. Because there are two Helen Henrys there, and one is 1113 and one is 713 Smithfield Street.
Q. Isn't Helen Henry's address 1352 Curtis Avenue, Cleveland, Ohio?
A. Yes, sir.
Q. You didn't give the doctor those addresses that you had; he gave you this address 713 Smithfield Street?
A. He did, sir; and he made the mistake when *it* wrote it 713, too.
Q. Well, now that particular time, did you have any talk with Mr. Arnold Staley?
A. On what prescription is that—for what amount and what is the address?
Q. Seven drams each; your wife's address being the Curtis Avenue address, and your address 713 Smithfield Street.
A. I did.
Q. What conversation did you have?
A. He wanted to know why it was I couldn't have the right address. He said, "This is not the same address as the other."
Q. What then?
A. We talked about some other things, and he said, "You want to get the right address on them."
120 Q. Did he ask you where you did live?
A. No.
Q. Didn't ask you where you lived?
A. No, sir.
Q. Didn't ask you if you were using it yourself?
A. No.
Q. That is all the conversation you had with him, is that it?
A. He asked me if I had the money to pay for it.
Q. Who asked you that?
A. They always asked me that.
Q. Who asked you that this time?
A. The clerk.
Q. But I am talking about Arnold Staley.
A. He never asked me that.
Q. On April 6th, did you have any talk with Mr. Arnold Staley that time?
A. What amount of morphine is there on that prescription?
Q. Sixteen drams.
A. Sixteen in one prescription?
Q. Yes.
A. What is the address?
Q. 1562 Curtis Avenue.
A. No, I don't think I did.

Q. What do you say?
A. I don't think I had any conversation with him that day.
Q. Where did you get this name Jenny Lind Street?
A. Got it from knowing the name of the street and that there is a street of that name in McKeesport.
Q. How did you know that?
A. I have been in McKeesport and know.
Q. Did you ever live in McKeesport?
A. No, sir; I never lived in McKeesport, but I have people that I know that live there.

121 Q. Whom do you know that live there?
A. A lady by the name of Mrs. Squibb.

Q. At that time you had two prescriptions filled?
A. What two? From the same doctor?
Q. One from Dr. Moy, for eight drams, and one from Dr. Trader for five drams.
A. Yes, sir.
Q. Those prescriptions at this time that you got from Dr. Trader, you gave the name of Frank Keith.
A. Yes, sir, that is the only name I ever gave Dr. Trader, except Mrs. Keith.
Q. Did you have Mrs. Keith with you at Dr. Trader's?
A. I never had any woman at any doctor's office in the city of Pittsburgh.
Q. You never did?
A. No, sir.
Q. Who filled these two prescriptions for you of April 20th, five drams, from Dr. Trader, and eight drams from Dr. Moy.
A. That same clerk.
Q. The blond?
A. Yes, sir.
Q. Mr. Stuberry?
A. Yes, sir.
Q. Did you have any talk with Mr. Arnold Staley at that time?
A. As I said this morning, I am not positively sure if it was on that occasion or the occasion before, or after that, that I had a talk with him.
Q. Well, what was the conversation there on that occasion, or the occasion before or the occasion after?
A. He said he wouldn't fill no two prescriptions under the same name, in one day, but that he would fill them under different names.
Q. Is that all he said?
A. Yes, sir.

122 Q. Then you had three prescriptions filled at one time?
A. Later on than that day you have just spoken of; yes, sir.

Q. And under three different names, Frank Keith, John Henry and John Craig?
A. I did.
Q. Well, you say you had some of those addresses on Jenny Lind Street and one in Cleveland, Ohio?

A. I did.
Q. Those were the last prescriptions you had filled?
A. Yes, sir.
Q. When was it Mr. Arnold Staley told you he would not fill prescriptions for you with a Pittsburgh address?
A. It was long before this—three of four visits before this time. There are some prescriptions that were filled that are not there now, too.
Q. You remember that too?
A. Yes, sir.
Q. When was that?
A. In between dates on that.
Q. You are positive of that are you?
A. Sure, I am positive; most certainly I am positive.
Q. And you at this time were using eight grains of morphine a day?
A. I was.
Q. You remember that, do you?
A. Yes, sir.
Q. You had other prescriptions filled which are not there?
A. Which are not there; positively not.
Q. How do you know that they are not here?
A. Because they haven't been brought into evidence.
Q. Did you look through the books?
A. No.
Q. Who told you they were not there?
A. Nobody told me.
Q. Why do you say they are not there?
123 A. Because they haven't been brought up.
Q. Is that the only reason you have?
A. That is the best in the world.
Q. That is your idea of the best reason—that they are not there?
A. Yes, sir.
Q. With whom have you talked since you left the stand at noon?
A. Who have I talked with?
Q. Yes.
A. Mr. Henry.
Q. The district Attorney?
A. Yes, sir.
Q. Anyone else?
A. No, sir.
Q. Are you still living in Cleveland?
A. I am.
Q. Were you arrested?
A. When?
Q. At any time?
A. Yes, sir, I have been arrested.
Q. When were you arrested?
A. About three years ago.
Q. What were you arrested for then?

Mr. Humes: We object to the competency and materiality of this, as not being cross examination.

The Court: I don't think it is myself.

Mr. Williams: It tends to the credibility of the witness.

The Court: This question would tend to raise a collateral issue. A man may be arrested for an offense of which he is entirely innocent, and in fact the presumption of innocence continues
124 until he is convicted, and therefore it would only tend to raise collateral issues and confuse the question on trial to allow the question to be answered. The objection is therefore sustained and an exception noted to the defendant.

Mr. Marshall:

Q. Were you ever convicted of any crime?

Objected to as incompetent, irrelevant and immaterial, and not proper cross examination.

Mr. Marshall: This is asked for the purpose of attacking the credibility of the witness.

Objection sustained and an exception noted to defendant.

Mr. Marshall.

Q. Are you under arrest at the present time?
A. No, sir.
Q. Have you been under arrest since last May at any time?
A. No, sir.
Q. You have not?
A. No, sir.
Q. When, since last spring?
A. Not at all, nor since the spring before that, not the the spring before that.
Q. Then you have not been under arrest——
A. In three years.
Q. Have you been promised immunity for testifying here?

Objected to as incompetent, irrelevant and immaterial and not cross examination.

The Court: That is a different question.

(Objection withdrawn.)

A. In which way do you mean? I don't get your meaning.

125 Mr. Marshall:

Q. In any way.
A. I Can't answer a general question like that. I would rather answer it the way you want me to answer it. Ask me which way you mean?
Q. Do you understand the meaning of the word "immunity"?

A. I do.

Q. Well, in what way have you been?

A. If I haven't been arrested, I couldn't be promised immunity could I?

Q. Have you been promised that no information would be made against you if you testified here?

A. There is no reason why any information should be made against me and I have been promised nothing by nobody, nothing at all.

Q. You have never been arrested for giving away this opium?

A. Never.

Q. Who did you first tell you had given it away?

A. Who did I first tell what?

Q. That you had given this morphine sulphate away, during last spring?

A. Right at the trial here.

Q. Didn't you tell any person connected with the district attorney's office?

A. No, sir.

Q. When were you subpoenaed?

A. I got in here yesterday morning.

Q. When were you subpoenaed?

A. A week ago Friday.

Q. By whom?

A. The Cleveland marshal's office; there is the gentleman over there served the subpoena on me, came to where I worked and served a subpoena on me.

Q. What did you mean when you answered my first question, had you been promised immunity?

A. I told you I wasn't arrested, and I wanted to see that you made yourself clear.

Q. What did you mean when you said that you didn't know which way I meant?

A. I wanted to know what you meant.

Q. You understood the use of the word "immunity"?

A. I understood, and I haven't got any answer only what I made to the question. I was promised nothing whatsoever from anybody, and nobody has had reason to promise me anything.

Q. To whom did you give this morphine sulphate?

A. Friends of mine.

Q. Who are they?

A. Different friends.

Q. Who are they?

A. I don't care to mention their names,—fellows that has been held up for money for their morphine the same as I have been in the past. I will give you that much information, if you want it.

Mr. Marshall: I ask that the witness be directed by the Court to answer the question.

The Court: If counsel insists, you must answer the question.

A. I will give them to you. I can give you a lot of them.

Mr. Marshall:

Q. Who are they?
A. Will Kupp.
Q. Where does he live?
A. Cleveland, Ohio.
Q. Whereabouts?
A. I don't know his home address.
Q. What does he do?
A. Works on a newspaper there, he did at that time. I
127 haven't seen him since.
Q. What newspaper?
A. The Cleveland News.
Q. Who else?
A. Milton Boyce.
Q. How do you spell the last name, do you know.
A. I don't.
Q. Where does he live?
A. Cleveland, Ohio. I don't know his address.
Q. What does he do.
A. I don't know what he does.
Q. Where did you give it to him?
A. In Cleveland.
Q. Where,—Cleveland is a big place.
A. On East Nineteenth Street.
Q. Where, on East Nineteenth Street?
A. Where I used to room.
Q. Where is that?
A. I don't know just exactly remember the address; it has been a long — since then.
Q. When did you live there?
A. Last summer.
Q. What time last summer?
A. The first part of last summer, around April.
Q. And you can't remember the address?
A. No, sir.
Q. Between what streets was it?
A. Payne Avenue and Euclid Avenue.
Q. With whom did you live there?
A. I lived by myself.
Q. Who did you room with?
A. I don't know the woman that owned the place. I don't go and ask people their business when I get a room.
Q. How long did you room there?
A. About three months.
128 Q. Three months, and didn't know the name of the woman you lived with?
A. No.
Q. On which side of the street, going from Euclid towards Payne?
A. The right hand side. You can room in Cleveland and you will never see the landlady that owns the place in a year.

Q. To whom did you pay your money?
A. The woman that takes care of the place.
Q. Well, who did you pay?
A. The housekeeper.
Q. Did you pay by the week or the night, or what?
A. I paid by the week in advance.
Q. Did you get any receipts?
A. No, I don't need any receipts.
Q. I am not asking you whether you needed them. Did you get them?
A. No.
Q. Who else did you give any to?
A. George Henry.
Q. Where does he live?
A. Cleveland, Ohio.
Q. Where, in Cleveland?
A. On Payne Avenue—I don't know his address.
Q. Where, on Payne Avenue?
A. Out in the East End some place; I don't know his address.
Q. What does he do?
A. He used to work on the railroad.
Q. What railroad?
A. New York Central.
Q. That is his proper name?
A. That is the name I knew him by.
Q. How long have you known him?
A. Twelve or fifteen years.
Q. And don't know where he lived, except on Payne Avenue, in the East End some place?
A. That is all I know.
Q. Where did you give him the morphine?
A. Down where he works, in the New York Central Railroad Depot.
Q. What does he do?
A. I don't know what position he holds.
Q. How did you know when to meet him down there?
A. Before I came to Pittsburgh on one of my trips, he said, "I will be working when you get back, and will be down at the depot between eight and twelve o'clock." He worked nights.
Q. Well, who else?
A. That is about all.
Q. You gave it all to these three men?
A. Yes, sir.
Q. Is that correct?
A. Not all of it.
Q. Well, who else?
A. I don't remember the names.
Q. You don't remember the names of your friends to whom you gave it?
A. No, I don't.
Q. Where were you employed at this time?

A. Where I am employed at the present time.
Q. Where?
A. Cleveland, Ohio.
Q. By what firm?
A. Willard Storage Battery Company.
Q. Where is their place of business?
A. I work at the Cleveland Branch, 23rd Street and Chester Avenue.
Q. Is that where you are working now?
A. Yes, sir.
Q. 23rd Street and Chester Avenue?
A. Yes, sir, 23rd Street and Chester Avenue.
Q. How long have you been working there?
A. Since the latter part of July.
Q. Where were you working last spring?
1350 A. At the Henderson Auto Supply, Youngstown, Ohio.
Q. How long did you work there?
A. I worked there for eight or nine months.
Q. When did you go to work there?
A. It was—I can't say exactly the date—It was the latter part of the year 1916.
Q. The latter part of the year 1916?
A. I don't remember exactly the date.
Q. At any rate, you worked there from that time up until when?
A. Up until about—Well, I had two different positions with that firm.
Q. How long did you work in Youngstown, Ohio, with that firm?
A. Staying in Youngstown, you mean? I had two different positions with the firm.
Q. How long did you work with that firm in Youngstown, Ohio, remaining in Youngstown, Ohio?
A. About two months.
Q. When did you leave Youngstown, although still remaining in that firm's employ?
A. About the first of the year, when I went on their sales force.
Q. Then where did you live?
A. I was on the road for them and I would be in Cleveland one day, may be two or three days a week, may be in Youngstown one day a week or over in New Castle, or most any place I would happen to be at.
Q. When did you leave their employ?
A. Around in June.
Q. Under what name were you employed there?
A. My right name, John A. Frew.
Q. Where did you live three years ago?
A. Where did I live three years ago?
Q. Yes.
A. I am pretty sure it was Akron, Ohio.
Q. How long did you live in Akron?
A. Oh, I lived in Akron off and on.

131 Q. Off and on in Akron, Ohio; how long did you live there off and on?
A. My sister went to Akron, and I used to live with her there
Q. How long did you live there off and on?
A. About seven or eight months at that time.
Q. What is you sister's name?
A. I don't think that that has any dealings with this case.
Mr. Henry: Just answer.
A. My sister's name is Mrs. Craig.

Mr. Marshall:

Q. Does she live in Akron?
A. No, she don't.
Q. Where does she live now?
A. Youngstown, Ohio.
Q. Where does she live in Youngstown, Ohio?
A. I don't know; they just bought a home a short time ago, but I can tell you where her husband is in business, if that will help you any.
Q. What is her husband's name?
A. Ralph A. Craig.
Q. Where did you live before you lived in Akron?

Mr. Humes: We want to interpose an objection. It strikes me that for the purpose of any legitimate cross examination, this inquiry has gone as far as even license will justify. We have reached the point where it has become improper cross examination, and we object for that reason.

Mr. Marshall: This man, when he went on the stand, said he lived in Cleveland, Ohio, and lived there since he was a day old, I believe, intending to give the jury the impression that he was a man who was born and had lived in Cleveland all his life. The government brought that out.

132 Mr. Humes: My recollection is that he testified that he lived there off and on all his life.

The Witness: That is exactly what I did say.

The Court: You may ask the question.

(Question read, as follows: "Where did you live before you lived in Akron?")

A. In Cleveland, Ohio.

Mr. Marshall:

Q. Where, in Cleveland?
A. On Curtis Avenue, 5981.
Q. With whom?
A. With my sister.
Q. The same sister?
A. Yes, sir.

Mr. Henry:

Q. Mr. Frew, I show you the various prescriptions you testified as having had filled at Fleming's, and I will ask you to pick out the prescription which you testified to as being given by Dr. Moy after you were sent up to Moy's office by Mr. Arnold Staley.

A. This one.

Q. That is Exhibit 24, under date of April 6, 1917, calling for sixteen drams?

A. Yes, sir.

Q. And it was on that date you had this conversation with Mr. Arnold Staley, with request to the two-eighths?

A. Yes, sir.

Q. And the refusal to fill them for the address on Smithfield Street, Pittsburgh?

A. Yes, sir.

Q. Mr. Frew, state whether or not you were present in the
133 Fleming drugstore at any time when a one dram prescription was presented to be filled at the drugstore?

A. I was; I don't exactly remember what day it was.

Q. Can you fix the month and the year?

A. It was in April of this year.

Q. At one of the times you have presented these prescriptions?

A. Yes, sir.

Q. What was the charge, if you were present and saw it—How much was the prescription, first?

A. One-eighth.

Q. That is, one dram?

A. Yes, sir.

Q. How much was paid by the purchaser for one dram?

Objected to as incompetent, irrelevant and immaterial.

Mr. Henry: The purpose of the question is to show the variance in price between a one dram purchase and a larger prescription.

Objection overruled and exception noted to defendant.

A. Two dollars.

Q. How much was paid by you on the larger prescription?

A. $2.25.

Q. Do you remember the size of your prescription, as to whether or not it was above three drams?

A. Yes, sir, they were all above three drams.

Mr. Marshall:

Q. Who was the person who presented the prescription?

A. I don't know the person's name.

Q. Man or woman?

A. A woman.

134 Q. What time of day was it?

A. About 1:30.

Q. You don't know the date?
A. No, I don't exactly remember the date.
Q. Did you get a prescription filled at the same time?
A. Not at the same time; right afterwards.
Q. I mean the same day.
A. Yes, sir.
Q. Which prescription was that?
A. If I see the prescription I can tell. It was on April 20th.

The Court: Council for defendant, having asked the witness on cross examination whether he was ever convicted of a crime, which was objected to by counsel for the government, and the objection sustained, there are some authorities which would indicate that this is a question of privilege for the witness, rather than a question of law for the Court. The question will therefore be permitted, the witness being instructed that if the answer tends to incriminate or disgrace him, he has the privilege of declining to answer, this being a matter of privilege for the witness.

Mr. Marshall:

Q. Were you ever convicted of any crime?

Mr. Henry: You understand——
Mr. Marshall: I object to counsel for the Government cautioning the witness, after the instructions of the Court.

A. I refuse to answer.

Mr. Marshall:

Q. Why do you refuse to answer?
135 A. I don't have to tell you why. That is all the judge told me I had to do.

Mr. Marshall: I ask the Court to find out whether the witness's refusal to answer is proper or not.
The Court: If it would tend to disgrace or incriminate, you have the privilege of declining to answer.
The Witness: It tends to incriminate.

Counsel for the Government offer in evidence the prescriptions indentified by the witness, two of which, under date of March 14th, are in the prescription book, being Government's Exhibit 10, and the other prescriptions being Exhibits 20 to 29 inclusive.

135½ *Testimony of Joseph Lewis and John Capello.*

Pages of Testimony 144 to 198 Inc.

136 JOSEPH LEWIS, called on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

Mr. Henry:

Q. Where do you live, Mr. Lewis?
A. Toledo, Ohio.
Q. What is your business?
A. Traveling man.
Q. Are you an addict to the morphine sulphate habit?
A. Right now; yes, sir.
Q. How long have you been an addict?
A. About eighteen or twenty years, since I started to use it as a narcotic.
Q. Has Mr. Jin Fuey Moy ever prescribed morphine sulphate for you?
A. Yes, sir.
Q. When?
A. 25th day of March.
Q. What year?
A. This year.
Q. Did you go to the doctor's office on the 25th of March, 1917?
A. Yes, sir.
Q. Just tell us what took place there?
A. I went into the office and told him I wanted him to fix me up, that I was an addict, and he said, "What do you mean by that?" I said, "I have lost my health; my lungs were bad in 1911, and I was advised to go back to it. I had used opium by smoking, and I can't get it any more, and I have to use it hypodermically," and he gave me an examination, my eyes and chest, tested my chest, and looked over my body fully three-quarters of an hour, and started to write a prescription for three bottles, and I said, "Stop, I haven't a whole lot of money," and I got a prescription under the name of Henry McKnight, 48 Sibley Street, Detroit, Michigan, and I told him I had used as high as twenty-five or thirty grains a day,
137 and he shook his head, and said it was a whole lot to use, and he wrote me a prescription for eight bottles, and said, "Make this do you three weeks or longer."
Q. What did he charge you for this prescription for eight bottles?
A. Eight dollars.
Q. I show you Exhibit 30, being a prescription under date of March 25, 1917, written by Dr. Jin Fuey Moy, for Henry McKnight, 48 Sibley Street, Detroit, for eight drams, and ask you if that is the prescription you procured on your first visit to Dr. Moy's office?

A. That looks very much like it.
Q. What was said to you about where that should be filled?
A. Nothing whatsoever.
Q. Where did you get it filled?
A. Fleming's drugstore.
Q. Who filled it?
A. I really couldn't describe the man now; I got it from some clerk in there.
Q. What questions, if any, were asked you by the clerk?
A. None whatsoever.
Q. What did they charge you for the prescription?
A. $1.60 or $1.80 a bottle, I am not positive.
Q. Did you receive the eight bottles?
A. Yes, sir.

(Exhibit No. 30 offered in evidence by counsel for the Government.)

Q. Did you come to Dr. Moy's office again after this visit of March 25, 1917?
A. Yes, sir; on the 28th day of April.
Q. Did you see the doctor then?
A. Yes, sir.
Q. What examination, if any, was given you?
A. He ask- me if I had been there before. I said yes, and he said, "What is your name?" I told him "Henry McKnight, 48
138 Sibley Street, Detroit," and he looked back at some records, and I said I wanted to get some morphine, and he said, "You got eight bottles the 25th of March," and he started writing a prescription for eight, and I said, "I want to be gone some time, and I wish you would fix it up for twelve bottles." He argued awhile, and started to tell me I was using too much, and finally he gave me a prescription for twelve bottles, and said, "Make this last you thirty days or longer. You are using too much; I can't be giving you so much."

Q. I show you Government's Exhibit 31, being a prescription dated April 28, 1917, for twelve drams of morphine sulphate, and I ask you if that is the prescription you received from Dr. Jin Fuey Moy on the second visit?
A. It looks very much like it.
Q. How much did you pay for it?
A. One dollar a bottle, twelve dollars for all.
Q. Did you get it filled at Fleming's?
A. Yes, sir.
Q. What did they charge you?
A. Two dollars and half a bottle, $30 altogether. It had gone up in the last month.
Q. What questions, if any, were asked at the drugstore when you presented the prescription?
A. None.
Q. I show you Government's Exhibit 32, being a prescription by Dr. E. J. Trader to Joe Lewis, 1619 Collingwood Avenue, Columbus,

Ohio, for four drams, under date of March 25, 1915, signed by E. J. Trader, and ask you if you have seen that before?

Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.
Q. Did you get this filled at Fleming & Sons' drugstore?
A. Yes, sir.
139 Q. For how many bottles?
A. Four bottles.
Q. What did they charge for the four bottles?
A. $1.60 or $1.80—I forget which—a bottle.
Q. This was filled on the date of the prescription of Mr. Moy, of March 25, 1917?
A. Yes, sir.
Q. Mr. Lewis, that is the same date as the prescription of Dr. Moy, on the occasion of your first visit to Dr. Moy, is it not?
A. Yes, sir.
Q. And you got this filled the same day?
A. Yes, sir.
Q. Under different names?
A. Yes, sir.
Q. At the Fleming drugstore?
A. Yes, sir.

Cross-examination.

Mr. Marshall:

Q. Did you have them filled at the same time?
A. No, sir.
Q. When did you have the Moy prescription filled, morning or afternoon?
A. Between half-past eight and nine in the evening, as near as I can recollect.
Q. When did you have the Trader prescription filled?
A. Half-past three or four in the afternoon; it was Sunday afternoon.
Q. By different clerks?
A. Yes, sir.
Q. You use this morphine and have been using it for a great many years?
A. I started about twenty years ago using opium by smoking, and I got off in 1907, and stayed off until I lost my health in 1911, and was advised by my physician in St. Louis to take to smoking
140 the pipe again, and I didn't want to, and I started drinking whiskey, but in 1913 I thought I would rather take the pipe again, because I was ruining my health and business with the whiskey, and in 1913 I started using the pipe, then the Harrison Law came into effect, and I couldn't get opium, and I had to get morphine and use it hypodermically.
Q. Are you still using it?
A. Yes, sir.

Q. You are tubercular?
A. Yes, sir.
Q. What happens to you if you do not use it?
A. I have hemorrhage of the Lungs.
Q. Before Dr. Moy gave you any morphine, he made a thorough examination of you, you say, lasting about forty-five minutes?
A. About three-quarters of an hour—my eyes, chest and body.
Q. And he asked you a great many questions as to what effect morphine had on you?
A. He asked me what the benefit was to me and what the result was if I didn't use it.
Q. And did he also caution you to cut down the amount you were using?
A. Yes, sir.
Q. Were you working all the time you were using this morphine?
A. Yes, sir.

Mr. Henry:

Q. What amount are you using daily now, Mr. Lewis?
A. Six and half grains a day now, from my physician.
Q. Are you able to work on six and a half grains?
A. I am able to get along, but I never feel the best in the world.

Mr. Marshall:

Q. Under whose direction are you taking it now?
A. Dr. Haynes.
Q. Where?
141 A. Toledo.
Q. Is he a state doctor?
A. I don't know what you would call him; he gives me six and a half grains a day—for a fee.
Q. Do you have to go get it daily?
A. Yes, sir.
Q. Is that given to you under the supervision of the state there?
A. I don't know anything about the state—the same as I went to Dr. Moy and got a prescription.
Q. Were you given a supply to bring with you when you came here?

Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination.

The Court: Do you mean by this physician?
Mr. Marshall: I just want to know whether he was given a supply.

(Objection withdrawn.)

A. I get a supply of a week or ten days at a time from this physician.

(Counsel for the Government offer in evidence Exhibits 30, 31 and 32.)

JOHN CAPELLO, a witness called on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

Mr. Henry:

Q. Where do you live?
A. 3479 Theure Court.
Q. Did you ever use morphine sulphate?
A. Yes, sir.
142 Q. Have you ever been at the office of Dr. Jin Fuey Moy?
A. Yes, sir.
Q. Just what happened there on the occasion of your first visit?
A. I went upstairs and sat there awhile; he was talking to some one there, and finally he got through with him, and he called me over.
Q. Can you fix the time?
A. Between 12:30 and on- o'clock.
Q. What month?
A. In April.
Q. What name did you give when you came to Dr. Moy's?
A. Harry Lyman.

(Paper marked Exhibit 33.)

Q. I show you Government's Exhibit No. 33, being a prescription dated March 30, 1917, for Harry Lyman, 3242 Cedar Avenue, Cleveland, Ohio, for twelve drams. Have you seen that prescription before?
A. Yes, sir.
Q. Where did you get it?
A. From Dr. Moy.
Q. Were you at the office of Dr. Moy on the date of that prescription?
A. Yes, sir.
Q. Then you were in Pittsburgh on March 30, 1917?
A. Yes, sir.
Q. Just tell us what took place at the time you procured that prescription?
A. I went upstairs and sat there, and he got through and asked me what he could do for me, and I told him I wanted to get some morphine, and he asked me who sent me there, and I told him a friend of mine from Cleveland. He said how did he come to send me there, and I told him I knew him and he said everything was all right, to come down there. He asked me how many did I want.
143 Q. What examination, if any, did Dr. Moy make of you at the time you asked him for morphine?
A. None.
Q. Did he make any examination of your eyes?
A. No, sir.

Q. He asked you how much you wanted?
A. Yes, sir.
Q. What, if anything, was said by you?
A. I told him twenty.
Q. How much did he write for you?
A. Twelve.
Q. What did Dr. Moy charge you for this twelve dram prescription?
A. For the whole twelve?
Q. Yes.
A. Thirty-six dollars.
Q. I mean Dr. Moy?
A. Twelve dollars.
Q. Was anything said by the doctor as to where the prescription for twelve drams could be filled?
A. Fleming's.
Q. Did you at that time know where Fleming's store was?
A. No, sir.
Q. What was said by the doctor?
A. He told me to go to Joseph Fleming's drugstore.
Q. Did you go to Fleming's drugstore?
A. Yes, sir.
Q. Did you present this prescription?
A. Yes, sir.
Q. What, if any, questions were asked at the drugstore at the time you presented the prescription?
A. None.
Q. Do you remember what clerk you presented the prescription to?
A. He had blonde hair, and was smooth-faced and short.
144 Q. Did he have a moustache?
A. I don't think so at that time?
Q. What did he say when you handed him the prescription?
A. Nothing.
Q. Was anything said about the price?
A. No.
Q. What did he charge you?
A. Twenty-four dollars.
Q. For the twelve drams?
A. Yes, sir.
Q. I show you a prescription, being Government Exhibit 34, and being a prescription of Dr. E. J. Trader's to Harry Lyman, 3242 Cedar Avenue, Cleveland, Ohio, for four drams, under date of March 30, 1917, and ask you if you have seen that prescription before?
A. Yes, sir.
Q. Did you get that from Dr. Trader?
A. Yes, sir.
Q. Did you present this prescription for four drams at Fleming's drugstore?
A. Yes, sir.

Q. To what clerk did you present this prescription?
A. The same one.
Q. What, if anything, was said by him?
A. Nothing at all.
Q. Did you get the four bottles?
A. Yes, sir.
Q. What was paid for the four bottles by you?
A. Eight dollars.
Q. These prescriptions are dated the same day?
A. Yes, sir.
Q. They were presented at the same time?
A. Yes, sir.
Q. To the same clerk?
145 A. Yes, sir.
Q. How many packages did you get?
A. I think it was two.
Q. I show you Government's Exhibit 35, being a prescription of Dr. Jin Fuey Moy, for sixteen drams, under date of April 6, 1917, and I will ask you if you have seen that prescription before?
A. Yes, sir.
Q. Were you in Dr. Moy's office on that day?
A. Yes, sir.
Q. Had you been in Pittsburgh between the date of this first prescription, dated March 30th, and April 6th?
A. No, sir.
Q. What took place in Dr. Moy's office on April 6, 1917?
A. I went up there and asked him the same thing, I wanted sixteen bottles.
Q. What examination, if any, did the doctor make?
A. None at all.
Q. What was said by the doctor to you at that time?
A. He asked me where my wife was, the first time he asked me, he said he couldn't give me eighteen.
Q. What, if anything, was said with respect to your wife, on the date of March 30th, the first visit?
A. I wanted eighteen, and he said he couldn't let me have them, and I told him I would like to have them for my wife. He said to bring my wife with me, and I told him she was sick, and he let me have twelve.
Q. What did the doctor say on the occasion of the second visit, April 6th, about your wife?
A. He asked me where is my wife, and I told him she was sick, and I asked him to let me have sixteen.
Q. What did he write for you?
A. I think fourteen or sixteen, I don't remember that.
146 Q. What did the doctor charged you for that prescription?
A. Fourteen dollars.
Q. How many bottles does the prescription call for?
A. I don't know.
Q. Can you read?
A. Not that.

Q. At the times you visited the doctor, how did he fix his charges for prescriptions?
A. One dollar a bottle.
Q. And if the prescription calls for sixteen bottles, it was sixteen dollars?
A. Sixteen dollars.
Q. Did you present this prescription of April 6th at the Fleming drugstore?
A. Yes, sir.
Q. Do you remember to what clerk?
A. It was a kind of a red-faced and heavy-set fellow.
Q. What aged man?
A. I judge around thirty some.
Q. And what was said by the clerk, after you presented the prescription?
A. Nothing at all. He just went back and filled them up.
Q. Did he ask you any questions?
A. No.
Q. Did he fill the prescription?
A. Yes, sir.
Q. How many bottles did you get on that prescription?
A. Sixteen, I guess.
Q. How much did you pay?
A. For the bottles?
Q. Yes.
A. $32.
Q. I show you Government's Exhibit 37, being a prescription of Dr. Jin Fuey Moy, under date of April 16, 1917, calling for
147 sixteen drams, to Harry Lyman, 3242 Cedar Avenue, Cleveland, and ask you if you have seen that prescription before?
A. Yes, sir.
Q. Were you at Dr. Moy's office on the date of that prescription?
A. Yes, sir.
Q. What was said by the doctor, if anything?
A. Nothing.
Q. What examination, if any, did he make?
A. None.
Q. What did he charge you for that prescription?
A. Sixteen dollars.
Q. Did you present that to the Fleming Company?
A. Yes, sir.
Q. What questions, if any, were asked?
A. None at all.
Q. What did they charge you per bottle?
A. For one or for all?
Q. For one or for all.
A. Two dollars for one, $32 for the sixteen.
Q. I show you Government's Exhibit 36, being prescription of Dr. Jin Fuey Moy, under date of May 8, 1917, to Harry Lyman, 3242 Cedar Avenue, Cleveland, Ohio, for fourteen drams, and ask you if you have seen that prescription before?

A. Yes, sir.
Q. Were you at Dr. Jin Fuey Moy's office on the date of that prescription?
A. Yes, sir.
Q. What examination, if any, was made?
A. None.
Q. Did you present that prescription to the Fleming drugstore?
A. Yes, sir.
Q. What, if any, questions were asked by the clerk, or any person there, when you presented the prescription?
A. None at all.
148 Q. Do you remember what they charged you for that prescription?
A. Fourteen dollars.
Q. That is, Dr. Moy?
A. Yes, sir.
Q. What did the Fleming Company charge you?
A. $15; it was raised then.
Q. $2.50 a dram?
A. Yes, sir.
Q. Mr. Capello, on these visits to Dr. Moy by you, in the months of March, April and May, 1917, did Dr. Moy at any time give you more than one prescription?
A. Yes, sir, the last time.
Q. Just tell us what took place there.
A. I went up to him and wanted to get twenty-four bottles, and he said he couldn't let me have them. He said the best he could let me have was sixteen. I begged him to let me have the other eight, and he said he would see what he could do, and went down in a drawer and pulled out another prescription—looked them all through and dug one out, and wrote another prescription on somebody else's name.
Q. Then he wrote you one for sixteen and eight?
A. Yes, sir.
Q. I will ask you to examine these prescriptions again, and state your recollection of what visit it was that you got the sixteen and the eight?
A. May 8th, the last trip I made.
Q. The prescription for May 8th calls for how many drams?
A. I don't know.
Q. You got two prescriptions from Dr. Moy, one calling for a sixteen, under what name?
A. Harry Lyman.
Q. The Cleveland address?
A. Yes, sir.
149 Q. What name was the other prescription under?
A. I don't remember.
Q. State under what circumstances the other name was written?
A. It was written under a different name.
Q. Who supplied the name?
A. Dr. Moy.

Q. Where did Dr. Moy get the name, if you know?
A. Dug in a drawer through a lot of old prescriptions he had there.
Q. Did he make any examination at this time?
A. No, sir.
Q. What did he charge you per dram for this prescription?
A. Sixteen dollars.
Q. Sixteen dollars for the sixteen, and how much for the eight?
A. Eight dollars.
Q. Did you present the two prescriptions at the Joseph Fleming & Sons' drugstore?

Objected to as leading.

Q. What was done with the two prescriptions?
A. Took them to Joseph Fleming's.
Q. What happened there?
A. I gave them to a clerk.
Q. Which clerk?
A. The small blonde fellow.
Q. What did he do if anything?
A. He took them to some other fellow, a tall slim fellow.
Q. Do you see the tall slim fellow in court?
A. Yes, sir.

(Arnold Staley asked to stand up.)

Q. Is that the gentleman?
A. Yes, sir. He asked me where I got them, and I told him Dr. Moy, and he said he doesn't do that, but "Mum's the word."
150 Q. And he filled both prescriptions?
A. Yes, sir.
Q. What were you charged for these prescriptions?
A. For the prescription or the bottles?
Q. Two dollars a bottle?
A. $2.50.
Q. Did you get these in one package, or more than one?
A. Got them in a box, twenty in a box, and four wrapped up in a little bundle, I think.
Q. More than one package?
A. Yes, sir.

Court here adjourned until 10 o'clock, A. M., Wednesday, December 19, 1917.

151 And now Wednesday, December 19, 1917, trial resumed at ten o'clock A. M.

JOHN CAPELLO on stand.

Cross-examination.

By Mr. Marshall:

Q. Where are you living now?
A. 3479 Theuer Court.
Q. You are not living there now, are you?
A. Right now.
Q. No, I mean for the last three or four months?
A. No, I am in the County Jail.
Q. In the County Jail at Beaver?
A. Yes, sir.
Q. You were brought over here in custody, were you?
A. Yes, sir.
Q. What is your right name,—Capello?
A. Yes, sir.
Q. The first time you came over here, when you went to Dr. Moy's office, was on March 30, was it?
A. Yes, sir.
Q. And at that time you were an addict, you were addicted to the use of morphine at that time?
A. Yes, sir.
Q. How much were you using at that time?
A. Between twelve and fifteen grains.
Q. Sometimes more than that?
A. Sometimes, yes.
Q. As high as twenty grains?
A. No, not that much.
Q. Well, how much?
A. Well, it might have been a grain or two more, sometimes less.

Q. It might have been as much as eighteen grains a day?
152 A. Yes, sometimes.
Q. Did you tell Dr. Moy how much you were using?
A. Yes, I think he did ask me that.
Q. He looked at your eyes?
A. No, sir.
Q. The first time you came there?
A. No, sir.
Q. Didn't look at your eyes?
A. No.
Q. Did he ask you what effect morphine had on you?
A. No, sir.
Q. Did he ask you what symptoms you had when you were not using it?
A. No, sir.
Q. But he did ask you how much you were using?

A. Yes, he did ask me that.
Q. And you told him how much you were using, did you?
A. Yes, sir.
Q. Now, the first time you came there, on March the 30th, you got a prescription for twelve drams?
A. Yes, sir.
Q. And a dram or a bottle would last you about three days?
A. About that.
Q. Now, on April the 6th you got sixteen drams?
A. Yes, sir.
Q. Didn't you tell Dr. Moy that you were using this for yourself?
A. No, sir.
Q. What?
A. No, sir. I told him me and my wife.
Q. Oh, you told him you were using it for you and your wife?
A. That I was getting it for me & my wife.
Q. Well, did you tell him afterwards that you were using for you and your wife?
A. I told him I was getting it for me and my wife.
Q. Did you tell him your wife was an addict?
153 A. Yes, sir.
Q. Did you bring your wife over with you?
A. No, sir.
Q. You also went to Dr. Trader on March the 30th?
A. Yes, sir.
Q. Did you say that you had this Trader prescription and the Moy prescription filled at the same time?
A. Yes, sir.
Q. You are sure of that, are you?
A. Yes, sir.
Q. Did you ever have the Trader prescription filled at all, yourself?
A. What do you mean—did I take it in myself?
Q. Did you take it in or did you send somebody else in with it?
A. I took it in myself.
Q. What time did you get into Pittsburgh on the 30th of March?
A. Around twelve o'clock.
Q. What time did you get to Dr. Moy's office?
A. Along about half past twelve or a quarter of one.
Q. What time did you get to Dr. Trader's office?
A. Oh, forty-five minutes or an hour later.
Q. When did you leave Pittsburgh?
A. At one-thirty.
Q. One-thirty what?
A. One-thirty o'clock.
Q. In the afternoon?
A. Yes, sir.
Q. You left the same day that you got it?
A. Yes, sir.
Q. Within an hour an- a half?

A. Yes, sir.
Q. What time does that train get in from Cleveland?
A. Well, it is most generally late about thirty-minutes.
154 Q. What time did you get in?
A. Around twelve o'clock.
Q. What time is it due?
A. Around twelve o'clock.
Q. What train did you come in on?
A. On the Erie.
Q. You came in on the Erie, and that is on the South Side?
A. I don't know what side it is on.
Q. Well, it is across the Monongahela River?
A. Yes.
Q. What time did you leave Cleveland?
A. Eight-fifteen.
Q. On march the 30th?
A. Yes, sir.
Q. How did you get from the South Side over to Pittsburgh?
A. What do you mean, over from the depot?
Q. Yes.
A. On the car.
Q. On a street car?
A. Yes, sir.
Q. Where did you get off of the street car?
A. In front of the Post Office here?
Q. In front of the building in which we are now?
A. Yes, sir.
Q. And you went up to Grant Street then, did you?
A. Yes, sir.
Q. How long did you have to wait there?
A. Wait where?
Q. At Dr. Moy's office?
A. Well, I didn't have to wait more than about fifteen minutes, I guess.
Q. And how long were you in Dr. Moy's office?
A. Oh, about ten or fifteen minutes.
Q. Then when you left there, where did you go?
A. To Fleming's.
155 Q. Directly to Fleming's from Dr. Moy's office?
A. Yes, sir.
Q. Well, when you left the train on the South Side you came over to Pittsburgh on a Street car?
A. Yes, sir.
Q. And the first place you went to was to Dr. Moy's office?
A. Yes, sir.
Q. And from Dr. Moy's office you went directly to the Fleming drugstore?
A. The first time, you mean?
Q. That's the only time I have been talking about.
A. Well, then I went over to Dr. Trader's.
Q. Well, didn't you say a minute ago that you went directly to Fleming's?

A. No. You were asking me about how I got off the street car.

At the request of counsel for defense, the following questions and answers just previously made were read to the witness:

Q. How long were you in Dr. Moy's Office?
A. Oh, about ten or fifteen minutes.
Q. Then, when you left there, where did you go?
A. To Fleming's.
Q. Directly to Fleming's from Dr. Moy's Office?
A. Yes, sir."
Q. What did you mean by that?
A. Well, I stopped over at Dr. Trader's Office before I went there.
Q. Isn't it a fact that prescription from Dr. Trader's office was filled on the 31st of March and not on the 30th. Isn't it a fact that that was filled on the next day, on the 31st?
A. No, sir, it was filled on the same day.
Q. Why did you say, then, that you went from Dr. Moy's office directly to Fleming's?
A. Well, I don't think about Trader.
Q. Well, you are under oath, aren't you?
156 A. Yes, sir.
Q. Don't you pay any attention to your oath?
A. Yes, sir.
Q. Well now, did you come directly to Fleming's office from Dr Moy's office or not?
A. No, I stopped in at Trader's.
Q. How long did you have to wait at Trader's.
A. About the same length of time.
Q. Ten or fifteen minutes.
A Ten or fifteen minutes.
Q. Did Dr. Trader examine you?
A. No.
Q. He didn't examine you?
A. No, sir.
Q What did you say to him?
A. I told him what I wanted and he just filled it out?
Q. Didn't examine you?
A. No, sir, none whatever.
Q. Did he ask you if you were an addict?
A. I don't remember if he did ask me that or not.
Q. You don't remember?
A. No.
Q. Did he ask you who you were?
A. No.
Q. Didn't ask you who you were?
A. No.
Q. Did you tell him?
A. No. He just asked me my name and address that's all.
Q. Then he did ask you your name?
A. Certainly, he asked me my name.

Q. Didn't you say a minute ago he didn't even ask who you were?

A. Well, I didn't know what you meant. He asked me my name and address, if that is what you mean, yes.

Q. Didn't I ask you if he asked you who you were and didn't you answer no?

157 A. Yes.

Q. Did you understand the question?

A. Not at first.

Q. You didn't?

A. No.

Q. Why did you say no, then, if you didn't understand it?

A. I didn't know what you meant.

Q. Well, what did you think I meant?

A. I didn't know.

Q. You didn't know, but you swore no, nevertheless. Where is Dr. Trader's office?

A. I think it is on Grant Street here.

Q. On Grant Street? Where on Grant Street?

A. I don't know. I know it is up the street.

Q. Where is Dr. Moy's office?

A. Well, it's a little ways below.

Q. On the same street?

A. No, not on the same street.

Q. Well, isn't Dr. Moy's office on Grant Street?

A. I don't know if it's on Grant, or what it is on; I never took notice of it.

Q. When you left Dr. Moy's office, which way did you go to get to Dr. Trader's office?

A. The next street over, and then down.

Q. When you came out of Dr. Moy's office, did you turn to the left—to the right, I mean.

Q. You turned what?

A. To the right.

Q. Dr. Moy's offices are on the second floor, are they?

A. Yes.

Q. Is that correct?

A. Yes, sir.

Q. You go upstairs and along a hallway and into the waiting room, do you?

158 A. Yes, sir.

Q. And is the waiting room in the front or in the back?

A. In front.

Q. And then, after you left his office, you came out into the hall and went downstairs and came out on the street, out of the door, downstairs?

A. Do you mean after I got the prescription filled?

Q. No, after you got the prescription?

A. I went from the waiting room into another room, into his office.

Q. I understand; but after you got the prescription, you came down-stairs and out the front door?

A. Yes.

Q. And when you came out the front door, you turned to the right, did you?

A. Yes.

Q. How far did you go to the right?

A. Oh, about a half a block.

Q. Half a block to the next street?

A. Yes, sir.

Q. Then which way did you go on that street?

A. I came down this way.

Q. Past the post office?

A. No, sir.

Q. You came down this way from Dr. Moy's office?

A. Yes, sir.

Q. Then you turned to the right from his office to the next street and turned down that street to Dr. Trader's office?

A. No, sir.

Q. Where to?

A. To Fleming's.

Q. Then you did go to Fleming's right after you left Dr. Moy's office, did you?

A. No, I went over to Trader's office, and then went around——

159 Q. I know—but isn't it a fact that you went to Fleming's first?

A. To Fleming's first?

Q. Yes; before you went to Dr. Trader's office.

A. No, I didn't. I went to Trader's.

Q. Then you came out of Dr. Moy's office and turned to the right, and where did you go?

A. Then I went down the next street, I don't know what the name of it is.

Q. Then where did you go?

A. I went down to Fleming's.

Q. That's where you went when you left Moy's office, wasn't it, to Fleming's?

A. No, I went to Dr. Trader's.

Q. Well, did you come out of that door and turn to the right to go to Dr. Trader's?

A. I went back to the next corner. Frew was waiting for me there.

Q. Oh, you and Frew were together?

A. Yes, sir.

Q. And where did he take you?

A. He took me over to Trader's.

Q. Who went to Trader's with you?

A. I went myself. He stood on the corner.

Q. Did you see Frew go into Dr. Moy's office?

A. Frew went in first.

Q. Then how long was he in there?
A. Oh, about ten or fifteen minutes.
Q. Then you waited until Frew came out, did you?
A. Yes, sir.
Q. And then you went in?
A. Yes, sir.
Q. And you waited ten or fifteen minutes?
A. Yes.
Q. How long were you in the doctor's office?
A. Ten or fifteen minutes.
160 Q. But you were in the waiting office first?
A. No, I went into the office.
Q. Which office were you in first?
A. I was in the waiting room.
Q. And did you have to wait in the waiting room before you saw him?
A. No, sir.
Q. Didn't you say you had to wait ten or fifteen minutes before you saw him?
A. I thought you meant how long it took me to get the prescription, and that was ten or fifteen minutes.
Q. Where was Frew waiting for you?
A. On the corner.
Q. That was the corner above as you turned to the right, is it?
A. No, you turn to the left.
Q. I thought you turned to the right when you came out of Moy's office.
A. You are talking about the saloon now.
Q. You didn't mention a saloon. You are the one that is talking about a saloon. I don't know anything about saloons. When you came out of Dr. Moy's office, you turned to the right, did you?
A. No, I came down and met Frew.
Q. Did you turn to the right?
A. No, I would have to turn to the left there.
Q. Didn't you say several times since you have been on the stand that when you came out of Dr. Moy's office you turned to the right?
A. Yes, sir.
Q. Which did you do?
A. I turned to the left.
Q. It's the left now, is it?
A. Yes, sir.
Q. You had it the right half a dozen times, and now you say it is to the left. Is that correct?
A. Yes, it was to the left.
Q. And where did you meet Frew?
161 A. Right below, in the saloon doorway, there.
Q. Then where did you go?
A. To Dr. Trader's.
Q. Who went into Dr. Trader's first?
A. I went in. Frew didn't go in at all.

Q. Frew didn't go into Trader's?
A. No.
Q. All right. You went into Dr. Trader's office?
A. Yes, sir.
Q. By yourself?
A. Yes.
Q. How long were you in there?
A. About the same time, ten or fifteen minutes.
Q. And you saw Dr. Trader?
A. Yes.
Q. Didn't have to wait on him?
A. No.
Q. Saw him immediately?
A. Oh, in about two or three minutes.
Q. Two or three minutes, and it took him ten or fifteen minutes to ask you your name and address and write the prescription?
A. Yes.
Q. That's all he asked you?
A. Yes.
Q. Then when you came out of there, where did you go?
A. I went back to the corner to Frew.
Q. Was Frew still there?
A. Yes.
Q. Then where did you go?
A. Then we turned up the next street and came down.
Q. Down to where?
A. To Fleming's.
Q. And Frew didn't go into Trader's?
A. No, sir.

162 Q. Well, from Trader's, you went down to the druggist, did you?
A. Yes, sir.
Q. And you went in with both of the prescriptions?
A. Yes, sir.
Q. And where did Frew go?
A. He went in first, and then when he came out I went in.
Q. How long was he in there?
A. I judge about ten minutes.
Q. Then you went in, and how long were you in?
A. About the same length of time.
Q. Why didn't you go in together?
A. I didn't think they would give them to us together.
Q. And you had never been there before?
A. Yes, sir.
Q. And still, when you went in you presented both of the prescriptions?
A. Yes, sir.
Q. Although you didn't think you would get them if you went in together?
A. Yes, sir.
Q. Did you think you would get both prescriptions filled?

A. I did get them filled.
Q. Well, did you think you would get them both filled?
A. No, sir.
Q. But still you presented them both. You didn't present one first, and get it filled?
A. No, sir.
Q. But you presented them both together?
A. Yes, sir.
Q. Although you didn't go in with Frew, because you thought you wouldn't get them filled if you went in together?
A. Yes, sir.
Q. That's your story?
A. Yes, sir.
Q. And whom did you see on that occasion?
163 A. Do you mean the clerk?
Q. Yes.
A. Some young fellow with light hair.
Q. Mr. Studeny?
A. I don't know what his name is.
Q. Well, you have seen him here before. Is that the man—(indicating Mr. Studeny?)
A. Yes, sir.
Q. Did you see anybody else in there at that time?
A. In the store?
Q. Yes.
A. I didn't speak to him; there was another clerk there.
Q. Well, did anybody else speak to you?
A. No, sir.
Q. And you say that this man, Mr. Studeny, filled your two prescriptions at that time without a word?
A. Yes, sir.
Q. You didn't see Mr. Staley at that time?
A. I don't know who you mean.

(Mr. Arnold Staley was here asked to stand up.)

A. No, sir.
Q. When was it that you went in with the two prescriptions and saw Mr. Arnold Staley?
A. Do you mean what time of day?
Q. No, what day and what month?
A. On March the 30th.
Q. It was on March the 30th that you went in and saw Mr. Staley and talked to him about the two prescriptions and had them both filled?
A. Not Mr. Staley, no.
Q. Well, what did you mean when you said it was March the 30th that you went in and saw Mr. Staley?
A. Well, it was March 30, but not Staley; I didn't see him.
Q. What did you mean by testifying a minute ago that you
164 went in and saw Mr. Staley on March 30th?
A. I didn't say that I saw him on March the 30th at all.

Q. Well then, when was it that you saw him?
A. Around the 16th of April.
Q. Isn't it a fact, sir, that the prescription of Dr. Jim Fuey M[oy] of March the 30th, 1917, was filled by Mr. Wylie, the other cl[erk] and not the blond clerk at all?
A. No, sir, it was filled by the young clerk there.
Q. Was the other clerk in the store?
A. Yes sir.
Q. Both in the store?
A. Yes. He took them and gave them to this other clerk.
Q. Who took them?
A. He did.
Q. Who do you mean by "he"?
A. Why, the young clerk.
Q. Do you mean Mr. Stuckey?
A. Well, I don't know his name.
Q. You mean the young man that stood up there?
A. Yes, sir.
Q. He took them and gave them to the other clerk?
A. Yes, and he came out and gave me the bottles.
Q. Why, didn't you say to the *the* District Attorney that it was [the] young man that filled your prescriptions?
A. He gave them to me.
Q. Didn't you say that he was a young man that filled the[m]
A. No, I didn't say he filled them.
Q. Then after you left Fleming's, where did you go?
A. To the depot.
Q. How did you get to the depot?
A. On a car.
Q. Where did you get the car?
A. Right in front of the Post Office.
Q. And from there you rode over to the South Side?
167 A. Yes, sir.
Q. Where in front of the Post Office, did you get a car [to] the station on the South Side?
A. The other side of the street.
Q. That is, the other side of the street that runs in front of [the] Post Office?
A. Yes, sir.
Q. Do you know the name of that street?
A. No, sir.
Q. Smithfield Street?
A. No, sir.
Q. Well, it was the street that runs in front of the Post Off[ice]
A. Yes, sir.
Q. And on which corner did you take the car?
A. It was over on that corner—(Indicating).
Q. Over there on that corner, over there by——
A. I am not sure, but I think that was the corner over th[ere]
Q. Well, did the car go directly across the bridge to the stati[on]
A. Yes, sir.

Q. The street car?
A. Yes, sir.
Q. Don't you know there are no cars running that way on that street today, and don't you know there were no cars running that way at that time?
A. I don't know; I took a car and went to the depot.
Q. Are you guessing, or what are you doing?
A. No, I am not guessing.
Q. Then where did you take a car?
A. I don't know anything about this city at all.
Q. Then why didn't you say that? Why did you say that you took a car directly in front of the Post Office?
A. Well, I know I took a car to the depot.
Q. Oh, you know you took a car?
A. Yes.
Q. You are sure of that now?
A. Yes.
Q. What time did you get back to the depot?
A. Oh, about ten minutes after one, or a quarter after one, or five after one.
Q. What?
A. A little after one.
Q. You got in at twelve?
A. I didn't say at twelve; I said around twelve.
Q. And you got back to the depot a little after one?
A. Yes.
Q. And took the one-thirty back to Cleveland?
A. Yes.
Q. Did Frew go back with you?
A. Yes, sir.
Q. Both went back together?
A. Yes, sir.
Q. Anybody else with you?
A. No, sir.
Q. You were sworn in this case before, weren't you?
A. Yes, sir.
Q. Weren't you asked this question at that time: "Who filled the prescription at Fleming's? Describe the person if you can." Ans. Well, a little smooth-faced fellow, the fellow right there." Then didn't Mr. Stuleny stand up, and you said he was the man that filled the prescription.
A. He was the man I gave the prescription to.
Q. Didn't you testify that way at the first trial of this case?
A. Yes.
Q. Dr. Moy directed you to Fleming's, did he?
A. Yes.
Q. Did you ask him where to get them filled?
A. Yes, sir.
Q. You did?
A. Yes, sir.
Q. Why, you had Frew with you, didn't you?

A. Yes, sir.

Q. Well, didn't you know where to go to get them filled from Frew?

A. No.

Q. Who told you to go to Fleming's?

A. Dr. Moy.

Q. Why didn't Frew tell you where to go?

A. No, sir, he didn't tell me where to go.

Q. What did you ask Dr. Moy for, when you had Frew with you?

A. Well, I didn't know that Frew knew where it was.

Q. Why, didn't Frew tell you that he had gotten it before?

A. No.

Q. Oh, he didn't?

A. No, sir.

Q. Weren't you asked this question at the last trial, "Just tell us what took place when you went into the drugstore with the prescription" A. Well, I gave it to him and he went and filled it and brought it back and I paid him for it." You testified that at the last trial, didn't you?

A. I gave them to him, yes.

Q. And you "gave it to him and he went and filled it and brought it back and I paid him for it"?

A. I never paid him no money.

Q. Well, didn't you testify that way at the last trial?

A. I don't remember that I did.

Q. You don't?

A. No, sir.

Q. If you did so testify, was it true or not?

A. True to what?

Q. Was it true when you answered this question, "Just tell us what took place when you went into the store with the prescription" A. Well, I gave it to him and he went and filled it and brought it back and I paid him for it."

A. I don't remember of testifying to that.

Q. If you did so testify, was that correct or not?

A. I gave them to him, but I don't know whether he filled them or not. I know another clerk came out with them.

Q. Who did you pay for them?

A. The heavy-set fellow.

Q. Then you didn't pay the same man that you handed the prescriptions to?

A. No.

Q. Were you asked this question at that time "What was the total amount that you paid Dr. Moy? A. Twelve Dollars. Q. What was the total amount you paid the Fleming drugstore? A. Twenty-four dollars"?

A. Yes, sir.

Q. Then you didn't get the two prescriptions filled at that time did you?

Mr. Humes: We object to that sort of cross examination, under-

taking to put words in the mouth of the witness. At that time there was only one prescription regarding which the witness was being examined. The Trader prescription had not been produced and had not been identified, and there was no testimony in relation to that.

By the Court: He may answer the question whether he did or not.

Question read.

A. Yes.

Mr. Marshall:

Q. Well then, how was the total amount that you paid $24.00?

A. $24.00 was the total I got from Dr. Moy, yes.

169 Q. But you weren't asked that. You were asked what was the total amount you paid the Fleming drugstore, and you answered $24.00.

A. Well, at the last trial the two prescriptions weren't brought up.

Q. You don't know what was asked you?

A. All I was asked was Dr. Moy's prescription.

Q. You were asked what was the total amount you paid the Fleming drugstore and you answered $24.00.

A. That is for what I got from Dr. Moy.

Q. Isn't it a fact that you expect to be paid for testifying both at the last trial and on this trial?

A. No, sir.

Q. Didn't you tell two gentlemen who were in to see you, one of them a detective in the city of Cleveland, week before last, that you had been promised a piece of money to testify?

A. No, sir.

Q. That Mr. Geist had promised you a piece of money and that he had only given you three dollars?

A. No, sir.

Q. Had you gotten three dollars at the last trial?

A. I didn't get nothing.

Q. Nothing?

A. No.

Q. Do you know Mr. William Lavin, a detective in the city of Cleveland?

A. I have heard of him, yes.

Q. Oh, you know him well, don't you?

A. I don't know him at all. I never spoke to him in my life.

Q. Well, you spoke to him in jail, didn't you?

A. When he came up there that time.

170 Q. Didn't he know you?

A. He claimed he knew me.

Q. And didn't you know him?

A. No, sir.

Q. Didn't you meet him when you were down in the police station at other times in Cleveland?

A. No, sir.

Q. Weren't you asked this question at the last trial: "Who filled the prescription the second time for you? A. A different fellow?"
A. Yes, sir.
Q. Now, on which trip was it that you saw Arnold Staley?
A. The third trip.
Q. April the 16th, was it?
A. Yes, sir.
Q. When was your second visit after the thirtieth of March?
A. On the 6th.
Q. What date of the month is this?
A. What date of the month?
Q. Yes.
A. The 19th.
Q. How much late was your train on this 30th of March?
A. Fifteen or twenty minutes.
Q. What time was it due to arrive? What time ought it to arrive if it is on time?
A. I think it's 11:15 I am not sure.
Q. How?
A. 11:15, or 11:35; I don't remember.
Q. Now, on April the 16th, you say you got two prescriptions filled, is that right?
A. Yes.
Q. Who were they from, what doctor?
171 A. Dr. Moy.
Q. Of one you don't know the name that was on it?
A. No, sir, I don't.
Q. When you went into Fleming's drugstore on that occasion, what time did you get there?
A. About one o'clock, or five after, or somewhere like that.
Q. Did you come over on the same train, this train that is supposed to arrive here at 11:35 or something like that?
A. Yes, sir.
Q. And you went to Fleming's drugstore, and you got there about one o'clock?
A. Yes.
Q. On that occasion, had you been to any other doctor?
A. No, sir.
Q. Just to Dr. Moy?
A. Dr. Moy.
Q. And you went to Fleming's drugstore?
A. Yes.
Q. When you went in, whom did you see?
A. The young fellow.
Q. The young clerk there. And what did he say to you?
A. He didn't say nothing to me. He just took the prescriptions and took them to the tall fellow there standing in the back.
Q. Mr. Arnold Staley?
A. Yes.
Q. And what did Mr. Arnold Staley do?

A. He come up and asked me where I got them, and I told him from Dr. Moy.

Q. And then what?

A. Then he asked me—he said "We don't do this very often." He says, "'Mum's the word."

172 Q. "We don't do this very often, but 'Mum' is the word?

A. Yes.

Q. Didn't ask you who you were?

A. No, sir.

Q. Didn't ask what your name was?

A. No, sir.

Q. Didn't ask where you were from?

A. No, sir.

Q. Didn't say anything to you except what you have told us?

A. Just what I have told you.

Q. And then what did he do with the prescriptions?

A. Took them back and gave them to the other clerk again.

Q. This young man?

A. Yes, sir.

Q. And then what?

A. They were filled.

Q. How are you so sure about the 30th of March now—how do you fix that?

A. So sure?

Q. What?

A. Well, I knew it was around the first of April; that's why I am sure.

Q. Well then, you didn't know that it was the 30th of March from your recollection at all?

A. Well, I know it was around the first of April.

Q. At the first trial, you didn't know whether it was from the first to the tenth—came between the first and the tenth?

A. I didn't say between the first and the tenth. I said around the first of the month.

Q. Didn't you say, "Well, it was at the beginning of the month, between the first and the tenth"?

173 A. I don't remember of saying the tenth.

Q. Weren't you asked this question at the first trial of this case, "Can't you give us any more definite time as to this first prescription? A. Well, it was about the beginning of April, between the first and the tenth"?

A. It was around the first part of April.

Q. Didn't you make that reply to the question I have read to you?

A. I don't remember.

Q. Would you say that you didn't make that reply to that question?

A. I don't remember of making that reply.

Q. Were you asked this question at the first trial, "What time of day did you go to Dr. Moy's office? A. About one o'clock"?

A. Yes.

Q. Well, how do you fix it now as about twelve?

A. About twelve?
Q. Yes.
A. I said when I got into town it was about twelve.
Q. Then do you say that you got to Dr. Moy's office about one?
A. Between twelve-thirty and one. I stopped off and eat at a restaurant before I went there.
Q. Oh, you do recollect that you ate at a restaurant?
A. Somewhere around in one of these side streets leading up there.
Q. You didn't tell us that before. I asked you where you went from the depot, and you said you came up here and went to Dr. Moy's office, didn't you?
A. Well, I stopped in a restaurant and got something to eat.
Q. Who stopped with you?
A. Me and Frew.
Q. Have you told us now of all the prescriptions that you had filled at the Fleming drugstore?
A. No, sir, there's one more, I think.
Q. Which one?
174 A. The last one.
Q. Do you mean for eight drams?
A. No, sir, fourteen.
Q. Fourteen drams?
A. Yes, sir.
Q. Well, you told us about that—May the 8th, wasn't it?
A. What is that?
Q. May the 8th, wasn't it?
A. The last one?
Q. Yes.
A. I think it was May the 8th, yes, sir.
Q. Why didn't you mention the Trader prescription when you were asked by the Government's attorney, Mr. Henry, what took place when you went into Fleming's drugstore, why didn't you mention that you gave him two prescriptions?
A. I didn't think it was any use.
Q. What?
A. I didn't think it was any use.
Q. Why, when you were asked the total amount that you paid, why didn't you tell him about paying for this other prescription?
A. I didn't think there was any use in mentioning it.
Q. That is your explanation, is it?
A. Yes, sir.
Q. At any rate, you didn't mention the Dr. Trader prescription which you claim you had filled at the same time that you had Dr. Moy's filled, at the last trial, did you?
A. Mention it to whom?
Q. On the stand?
A. No, sir.

175 Redirect examination.

By Mr. Henry:

Q. Mr. Capello, at the time you got the twenty-four drams at Fleming's drugstore, where did you take them?

Mr. Marshall: That's all been gone into in chief.

Mr. Henry:

Q. Where did you take the twenty-four drams?
A. After I got them from Fleming's?
Q. Yes.
A. I took them to Cleveland.
Q. What did you do with them at Cleveland?
A. I gave a few to Frew and a few to my brother and a few for myself.

Mr. Marshall:

Q. When was that, the first visit?
A. No, sir, that was the third visit.
Q. Was Frew there with you?
A. No, sir.
Q. Did Frew ever give you any?
A. Yes, I think he did once.

175½ *Testimony of John Frew, Thomas McCaffery, and Charles F. Geist.*

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176 JOHN A. FREW, recalled by the Government, testified as follows:

Direct examination.

By Mr. Henry:

Q. Mr. Frew, state whether or not you ever came to Pittsburgh with John Capello, the witness who has just left the stand?
A. I did, sir.
Q. About what time did you come here with him?
A. Oh, it was the latter part of March or the first part of April; I couldn't exactly state what date it was.
Q. State whether or not you came together.
A. We did.
Q. Just tell us what you did together that day.
A. In respects to what?
Q. Well, after you got off the train.
A. Well, we got off the train and we took a car from the P. & L. depot, and got off at the corner of the street here by the Post Office—on that corner.

Q. Then what happened?

A. About four or five doors up the street there is a restaurant and we ate dinner there, and from there we went to Dr. Moy's office.

Q. And did you go together to Dr. Moy's office?

A. Yes, sir, to the office; not in the office, but to the place.

Q. State whether or not you told him about Moy's office?

A. Well, I don't just exactly remember whether I told him about the office; but I am pretty positive I told him I could show him where it was.

Q. Did you see Capello go into Moy's office?

A. He went into Moy's office after I came down from the office.

Q. Did you see him after he came down from Moy's office?

A. I did, sir.

Q. Did you see where he went after that?

A. He came out of Moy's office, and he turned in the wrong
177 direction to meet me, so he had to turn around and come back to meet me.

Q. Which way did he turn when he turned in the wrong direction?

A. That would be to the left, it would be to the right going into the office.

Q. Just tell us what happened there.

A. Well, when he turned to the right, I noticed him coming up there, and I whistled to draw his attraction, so he could see where I was, and he turned around and came back where I was.

Q. After you came together, what did you do?

A. He says he was going over to Dr. Trader's, and I said, "I will wait here for you until you come back."

Q. Did you see him after he came from Dr. Trader's?

A. Yes.

Q. Did you see him have a prescription from Dr. Trader?

A. Yes, sir.

Objected to by counsel for defense, as leading.

Q. Just tell us what you saw with respect to prescriptions?

A. Well, I seen him have a prescription from Dr. Trader and one from Dr. Moy.

Q. Were you with him in Pittsburgh after this time in the latter part of March?

A. Well, I couldn't be positively sure whether I was or not.

Q. Did you ever receive any morphine sulphate from John Capello in Cleveland?

A. I did, sir.

Q. Can you fix the time?

A. Oh, it was around—some time around in the middle of April I would judge.

178 Q. How much morphine did he have at that time?

A. He had twenty-four eight-ounce bottles.

Q. Do you remember in what shape it was at that time?

A. He had a red box with twenty eighths in it, and a package with four eighths.

Q. What did he do with the morphine sulphate, if anything, when you saw him?

A. Well, before he came down to Pittsburgh, I gave him money to get four for myself, and so he gave me the four that were in the little package, wrapped up.

Q. And where was this that he gave them to you?

A. In his room.

Cross-examination.

By Mr. Marshall:

Q. When he came to Pittsburgh, on March the 30th, did you go to Fleming's with him?

A. I went as far as Fleming's. I didn't go in with him.

Q. Did you go into Fleming's?

A. I did.

Q. You didn't mention that yesterday, did you?

A. I don't get your question.

Q. You didn't say yesterday that you were in there on the 30th?

A. I wasn't asked.

Q. You didn't say anything about it, did you?

A. I wasn't asked anything about it.

Q. Well, irrespective of whether you were asked about it or not, did you say anything about it?

A. I don't remember.

Q. When did you first tell anybody that you had had prescriptions filled under other names than Henry?

A. When did I do what?

Question read.

179 A. Oh, I don't remember when I first did tell anybody.

Q. Did you ever tell anybody until you came into court?

A. Well, I don't know.

Q. What?

A. I don't know whether I did or not.

Q. Didn't you testify yesterday that you had neve- told anybody anything about this until you came into court?

A. I don't think I did.

Q. Did you give Capello some of the drug that you got or procured here in Pittsburgh?

A. Did I give Capello what?

Q. Any of the drug that you had filled in Pittsburgh at the Fleming drugstore?

A. No, I don't think I never did.

Q. Never did?

A. No, sir.

Q. Did you ever give him any?

A. Any what?

Q. Any drug?

A. I don't think I did.

Q. When you went down to Fleming's drugstore with Capello on the 30th of March, did you go into the Fleming drug store?
A. I did.
Q. Did you go in first or afterwards?
A. First.
Q. Did you go back to Cleveland with him?
A. I did, sir.
Q. On the one-thirty?
A. The train around that time; I don't exactly know the time the train departs.

THOMAS McCAFFERY, called on behalf of Government, sworn, testified as follows:

Direct examination.

By Mr. Henry:

Q. Where do you live?
180 A. Youngstown, Ohio.
Q. Have you ever seen Dr. Moy, the defendant, before today?
A. Yes, sir.
Q. Where did you first see him?
A. On Grant Street, in his office.
Q. When was that?
A. It was about a year ago last October, I don't know what the date was, just exactly.
Q. How did you come to be at his office at that time?
A. I was directed to his place at Youngstown; a young fellow from Pittsburgh here told me about him.
Q. And why did you come there?
A. To get morphine.
Q. Tell us what happened there?
A. Why, I rung the doorbell, and as I rung the doorbell and as I walked in, his wife come out, or supposed to be his wife, a heavy-set lady, and she walked back in, and I walked up to the top of the stairs, and the doctor walked on through, and I walked into his office. And he asked me what I wanted, and I told him I was addicted to morphine. He says, Where do you live?" I told him Pittsburgh. And he walked over and looked at my eyes, and I was taking off my coat and I was showing him my arm and he says, "Oh, that's a squeety bite," and he lifted up the lids of my eyes and he looked in and he says, "How much you want?"
Q. What did you say, if anything?
A. Well, I started figuring on how much I had, and I says, "One." And I got two. I said two.
Q. I show you a prescription in U. S. Exhibit No. 9, being a book of prescriptions, identified as being a book of the Joseph
181 Fleming & Son Drug Company; the prescription I show you

being dated August 14, 1916, H-11908. I will ask you if you have seen that prescription before?

A. Yes, sir.

Q. Were you at Dr. Moy's office on the date of that prescription?

A. Yes, sir.

Q. Now, Mr. McCaffery, I wish you would state again when you first came to Pittsburgh to see Dr. Moy?

A. Well, as I said before, about a year ago; now I know exactly the date—August 14, 1916. Now I know, but I didn't know exactly.

Q. That was the date?

A. Yes, sir.

Q. And the doctor wrote you that prescription?

A. Yes, sir.

Q. For two drams?

A. Yes, sir.

Q. What, if anything, was said by the doctor as to the charges *as to the charges* for that prescription?

A. He charged me two dollars.

Q. Was there anything asked by you as to what he would charge?

Objected to by counsel for defense, as leading.

By the Court: Well, he paid him two dollars.

Mr. Henry:

Q. Well, what did you do with the prescription?

A. Why, I takes it down to the Fleming Drug Company.

Q. What, if anything, was said by Dr. Moy, as to where you should get the prescription filled?

A. No, sir. For I knowed. I had been down there before.

182 Q. Did you get the prescription filled at the Fleming drug-store?

A. Yes, sir, at that time.

Q. And what did you pay for the prescription at the Fleming drug-store?

A. Well, to my knowledge, I think it was $1.75. The price runs up and down at times, and I can't say for sure, but I think it was $1.75.

Q. $1.75 for a bottle?

A. Yes, sir.

Q. I show you a prescription under date of February 5, Thomas McCaffery, 143 Sixth Street, Pittsburgh, for 360 grains of morphine sulphate, signed by Dr. Jin Fuey Moy; the prescription being in U. S. Exhibit 9, being the prescription book of the Joseph Fleming Drug Company. Have you seen that prescription before?

A. Yes, sir.

Q. Where did you get that prescription?

A. From Dr. Moy.

Q. Do you remember what took place at Dr. Moy's office on the date of February 5th, 1917?

A. 1917?

Q. Yes; the day you got that prescription?

A. I had been going to Dr. Trader, and I didn't know I could get it filled at Fleming's, on account I didn't know you could get as many as you wanted——

Mr. Marshall: Wait a minute. Will Your Honor direct the witness to answer the question?

By the Court: Yes, just answer the question only.

Question read.

A. Yes.

183 Mr. Henry:

Q. What took place there?

A. I asked him could I get them filled at Fleming's, as Trader had been telling me to go there—Staley had been telling me to go——

Mr. Marshall: Will Your Honor tell this witness to answer the question?

A. I say, "Can I get this filled at Fleming's." He said, "Sure, Go right down." I said, "I didn't know. I thought yous were sore." He said "Oh, that's all right. He will fill it for you." I says, "I didn't know whether he would or not." And so I went out.

Mr. Henry:

Q. Did you get the prescription filled at the Fleming drugstore?

A. Yes.

Q. For how many bottles?

A. Five.

Q. How many grains is the prescription for?

A. 360.

Q. How many bottles did you get on that prescription?

A. Six.

Q. What did Dr. Moy charge you for that prescription?

A. Six dollars.

Q. What did you pay at the Fleming drugstore for the morphine that you got on that prescription?

A. I couldn't say whether it was $2.00 or $2.25.

Q. In U. S. Exhibit No. 9, I show you a prescription of Dr. Jin Fuey Moy, under date of February 14, 1917, to Thomas McCaffery, 143 Sixth Street, Pittsburgh, H-10891, for 300 grains, and I ask you if you got that prescription at Dr. Moy's office?

A. Yes, sir.

Q. What did Dr. Moy charge you for that?

184 A. $5.00.

Q. Did you get that prescription filled at The Fleming drugstore?

A. Yes, sir.
Q. What did they charge you?
A. I couldn't say what the price was.
Q. Was any examination made by Dr. Moy when you called at his office on the dates of February the 5th and February the 14th, 1917?
A. No, not as I know.
Q. In U. S. Exhibit 10, being a prescription book of the Joseph Fleming & Son Company, I show you a prescription under date of March 6, 1917, to Thomas McCaffery, 143 Sixth Street, Pittsburgh, Pa., signed by Dr. Jin Fuey Moy, for 240 grains. State whether you were at Dr. Moy's office that day.
A. Yes, sir.
Q. Did you get that prescription?
A. Yes, sir.
Q. What examination, if any, was made by Dr. Moy at that time?
A. None as I know.
Q. What did Dr. Moy charge you for that prescription?
A. $4.00.
Q. Did you get that prescription filled?
A. Yes, sir.
Q. Where?
A. At Fleming's.
Q. What did they charge you at Fleming's for filling that prescription?
A. I couldn't say just what price.
Q. Mr. McCaffery, you had other prescriptions filled at the drugstore of Joseph Fleming & Son Company besides the prescriptions of Dr. Moy, which you have testified to and identified?

185 Objected to by counsel for defense, as leading, and also as immaterial and irrelevant.

By the Court: It is leading.

Question withdrawn.

Mr. Henry:

Q. Did you have other prescriptions filled at the drugstore of Joseph Fleming & Son Company, beside the ones of Dr. Moy that you have identified?
A. The only others I ever got filled was at Fleming's.
Q. But the question is, did you have others filled at Fleming's than the ones of Dr. Moy?
A. Yes, I had them filled at Heidenreich's from Moy.
Q. Do you understand the question?

Question read.

A. Not as I know of. I can't remember.
Q. Did you ever have any Trader prescriptions filled at Fleming's?

A. Yes, sir.

Objected to by counsel for defense, as leading, and the witness has already stated that he didn't have any.

A. I said I couldn't remember.

Objection overruled.

By the Court: Well, he might perhaps call his attention. The objection is overruled.

Mr. Henry:

Q. Did you ever have more than one filled at Dr. Moy's written by Dr. Trader?

A. Yes.

186 Q. At the time you presented prescriptions at the Fleming & Son drugstore, state what questions, if any, were asked of you.

A. Well, I had them asking once what price I paid for them. I told them a dollar. And he says, "Well, you can go to Trader and get them for seventy-five cents."

Mr. Marshall: I ask that that answer be stricken out.

Mr. Henry: We consent to that.

By the Court: It may be stricken out.

Mr. Henry:

Q. What questions were asked of you, if any, about whether or not you were an addict?

A. At Fleming's?

Q. Yes, sir.

A. They never asked me.

Q. What questions, if any, were asked of you as to where you lived?

A. They never did.

Q. Have you ever sold any morphine sulphate?

A. Yes, sir.

Cross-examination.

By Mr. Marshall:

Q. You are an addict?

A. Yes, sir.

Q. How long have you been an addict?

A. Oh, about eight years.

Q. What is your business?

A. Why, collector now.

Q. How long have you been a collector?

A. It's about two weeks.

Q. What were you before that?

A. Iron worker. I worked in the mills, ran an electric crane.

187 Q. Have you worked at running an electric crane and working in iron mills for the last eight years?
A. No, sir.
Q. How long have you worked in iron mills?
A. Oh, about seven or eight years.
Q. Well, were those the last seven or eight years?
A. No. The last three or four years I have not been working in the mills. I am with a show.
Q. What are you with the show?
A. I had a concession.
Q. Attend to your business regularly?
A. Yes, sir.
Q. Do you have to have this morphine to attend to your business?
A. Yes, sir.
Q. And if you don't do it, can you attend to your business?
A. No, sir.
Q. You spoke of getting prescriptions filled at Fleming's. When was the first time that you ever had a prescription filled there?
A. I remember now that it was August 14, 1916.
Q. Well, at that time you got the prescription from Dr. Moy and went to Fleming's. He didn't give you any directions to go to Fleming's, did he?
A. No, sir. I knowed where to go.
Q. And when you went to Dr. Moy the first time, you told him you were an addict?
A. Yes, sir.
Q. Did you tell him how long you had been addict?
A. Yes, sir.
188 Q. And did he ask you about what symptoms you had if you didn't get the morphine?
A. Yes, sir.
Q. And you explained that to him, did you?
A. Sir?
Q. You explained what symptoms you had?
A. Well, there wasn't much said about that at all. There wasn't nothing said about that.
Q. Well, did you tell him that you had to have it?
A. No, sir, I just told him I used it.
Q. And he examined your eyes?
A. Yes, sir.
Q. And did you tell him how much you used?
A. Yes, sir.
Q. How much did you tell him you used?
A. Thirty grains a day.
Q. And did you use thirty grains a day?
A. Yes, sir, more at times.

1879 CHARLES F. GEIST, recalled on behalf of Government, testified as follows:

Direct examination.

By Mr. Henry:

Q. Mr. Geist, when did you come to Pittsburgh in the early part of the year 1917?

A. I think it was on the night of April the 29th.

Q. What was your purpose in coming here, if any?

A. To make my investigations, narcotic investigations, particularly of the Joseph Fleming & Son Company.

Q. Under what direction?

A. Under the direction of the Commissioner of Internal Revenue at Washington.

Q. Did you go to the drugstore of the Joseph Fleming & Son Company at that time?

A. No, sir.

Q. When did you go there?

A. On the morning of May the 3d.

Q. What investigation, if any, did you make on May the 3d and subsequently?

A. I requested their narcotic records and their prescriptions at that time, and also took an inventory of their stock that they had on hand at that time, particularly morphine sulphate.

Q. When did you take the inventory.

A. On the morning of May 3d, 1917.

Q. When did you go over the prescriptions?

A. From May 3rd, up until I think about the 8th or 9th—You mean going over checking the prescriptions?

Q. That's it.

A. I took those books to the office, you know, and checked them from the 3rd until we finished, which was about the 8th, I think.

Q. Did you compile a report of the prescriptions.

A. I did.

Q. And a summary?

A. Yes, sir.

Q. Does that report show the amount of morphine sulphate purchased by Joseph Fleming & Son Company in the period between March 1, 1915, up to and including May 3, 1917?

A. It does, yes.

1980 Q. Does it show the amount on hand on March 1, 1915 of morphine sulphate—your report and summary?

A. Yes, sir.

Q. Please state the amount of morphine sulphate on hand at the drugstore of the Joseph Fleming & Son Company on March 1st 1915.

A. On March 1, 1915, there were 16 ounces and 1 dram of sulphate of morphine.

Q. What was you business—or, first, how long have you been in the Government service?

A. I first went to the Government, I think, on May 1, 1915.

Q. What was your business prior to that?

A. I was a druggist.

Q. How long have you been a druggist?

A. About twenty-five years.

Q. How many bottles, one-eighths, such as have been shown in evidence here, bottles such as this, are there in sixteen ounces in one dram?

A. Eight times sixteen. Eight times sixteen is a hundred and twenty-eight. 128 bottles.

Q. And one dram would be 129?

A. 129 drams, yes.

Q. How much morphine sulphate was purchased on Government order form by the Joseph Fleming & Son Drug Company between March 1, 1915, and May 3, 1917?

A. The amount of purchases, as I have it, Mr. Henry, extend from the period from March 3d, 1915, to April 20, 1917; and at that time the amount purchased amounted to 4,581 ounces and 4 drams.

Q. The 4,581 ounces and 4 drams was in what form?

A. In cubes, such as these in this bottle, and crystal form.

Q. And in bottles?

A. In bottles, yes.

Q. Was that indicated by the order forms?

191 A. It indicated the amount.

Q. I mean the form and the amount?

A. Q. Oh, the cubes, yes; the morphine in cubes.

Q. In 4,581 ounces and 4 drams, how many bottles would that be?

A. It would be eight times that; I haven't got that figured out. I only have it here in ounces. I didn't figure it out. It is eight times 4,581 ounces.

Q. Well, figure it out.

A. 36,652 drams.

Q. Was morphine sulphate purchased in any other form than in eighth-ounce bottles between March 1, 1915, and May 3, 1917?

A. There were a number of tablets purchased, yes.

Q. What size tablets?

A. One-quarter grain and one-half grain.

Q. How many quarter grains and how many half grains?

A. 148,680 half grains and 57,100 one-quarter grain tablets.

Q. Did you ever go over the prescriptions of Dr. Jim Fuey Moy that you got at the Fleming drugstore?

A. I did, yes, sir.

Q. Between March 1, 1915, and May 3, 1917, how many prescriptions of Dr. Jim Fuey Moy were filled at the drugstore of Joseph Fleming & Son Company?

A. 11,687 prescriptions.

Q. What did those prescriptions call for, what narcotic drug?

A. The 11,687 prescriptions called for 15,796 drams of sulphate

of morphine, 13,200 one-half grain morphine tablets and 30,600 one-quarter grain morphine tablets.

Q. Does your examination and summary show the number of prescriptions written month by month by Dr. Jin Fuey Moy for morphine sulphate and filled at the drugstore of the Joseph Fleming & Son Company?

A. It does, yes, sir.

192 Q. How many prescriptions for morphine sulphate did Dr. Jin Fuey Moy write in the month of April and up to May the 3d, 1917?

A. From what date?

Q. For the month of April, 1917, and up to and including May the 3d, 1917?

A. 405 prescriptions.

Q. And what was the amount of morphine sulphate dispensed on those prescriptions?

A. 1,069 drams of sulphate of morphine, and 13,600 one-half grain morphine tablets, and 3,400 one-quarter grain morphine tablets.

Q. The 1,069 drams would be in what form?

A. In such as this bottle.

Q. How many prescriptions were written for the month of March, 1917, and give the amount of morphine sulphate prescribed?

A. In March, 1917, there were 227 prescriptions, calling for 757 drams of sulphate of morphine, 1500 half-grain morphine tablets and 1300 quarter-grain morphine tablets.

Q. What was the matter of prescriptions and the amount of morphine sulphate dispensed for February, 1917, written by Dr. Jin Fuey Moy and filled at the drugstore of the Joseph Fleming & Son Company?

A. There were 238 prescriptions, calling for 604 drams of sulphate of morphine, 3200 one-half grain and 1700 one-quarter morphine tablets.

Q. Give the same for January, 1917.

A. 297 prescriptions; 572 drams of sulphate of morphine, 3,000 one-half grain morphine tablets, and 1600 one-quarter grain morphine tablets.

Q. December, 1916?

A. 238 prescriptions; 408 drams of sulphate of morphine; 2400 one-half grain tablets, and 1400 one-quarter grain morphine tablets.

193 Q. November, 1916.

A. 301 prescriptions; 470 drams of sulphate of morphine; 2,000 one-half grain morphine tablets, and 2,000 one-quarter grain morphine tablets.

Q. October, 1916.

A. 435 prescriptions, 623 drams of sulphate of morphine, 3300 one-half grain morphine tablets; and 1800 one-quarter grain morphine tablets.

Q. September, 1916.

A. 443 prescriptions; 810 drams sulphate of morphine, 1700 one

half grain morphine tablets, and 1900 quarter-grain morphine tablets.

Q. August, 1916.

A. 532 prescriptions; 895 drams of sulphate of morphine, 700 one-half grain morphine tablets, and 1200 one-quarter grain morphine tablets.

Q. July, 1916.

A. 1013 prescriptions, calling for 1469 drams of sulphate of morphine, 1800 one-half grain morphine tablets, and 1200 one-quarter grain morphine tablets.

Q. June, 1916.

A. 844 prescriptions; 909 drams of sulphate of morphine, 100 half-grain morphine tablets; 1,000 quarter grain morphine tablets.

Q. May, 1916.

A. 969 prescriptions; 960 drams of sulphate of morphine; 1,000 one-half grain morphine sulphate tablets, and 1400 quarter-grain morphine tablets.

Q. April, 1916.

A. 796 prescriptions; 901 drams of sulphate of morphine; 2400 half grain tablets of morphine, and 2400 quarter grain tablets of morphine.

194 Q. March, 1916.

A. 748 prescriptions; 879 drams of sulphate of morphine, 2600 one-half grain morphine tablets, 1800 one-quarter grain morphine tablets.

Q. February, 1916.

A. 735 prescriptions; 801 drams of sulphate of morphine; 600 one-half grain morphine tablets, 1700 one-quarter morphine tablets.

Q. January, 1916.

A. 733 prescriptions, 795 drams of sulphate of morphine; 1600 one-half grain morphine tablets, and 1400 one-quarter grain morphine tablets.

Q. December, 1915.

A. 507 prescriptions, 560 drams of sulphate of morphine, 500 one-half grain morphine tablets, and 800 one-quarter grain morphine tablets.

Q. November, 1915.

A. 550 prescriptions, 628 drams of sulphate of morphine; 500 one-half grain morphine tablets, 600 one-quarter grain morphine tablets.

Q. October, 1915.

A. 340 prescriptions; 360 drams of sulphate of morphine; 600 one-half grain morphine tablets, 500 one-quarter grain morphine tablets.

Q. September, 1915.

A. 271 prescriptions; 289 drams of sulphate of morphine; 100 one-half grain morphine tablets; 100 one-quarter grain morphine tablets.

Q. August, 1915.

A. 320 prescriptions; 303 drams of sulphate of morphine; 700 one-quarter grain morphine tablets.

Q. July, 1915.

A. 277 prescriptions; 284 drams sulphate of morphine; 100 one-quarter grain morphine tablets.

195 Q. June, 1915.

A. 125 prescriptions; 155 drams of sulphate of morphine; and 50 one-quarter grain morphine tablets.

Q. Mr. Geist, these are all the prescriptions of Dr. Jin Fuey Moy?

A. They are, yes, sir.

Q. How many prescriptions of Dr. Trader's were filled at the drug-store of Joseph Fleming & Son Company in this period between March 1, 1915 and May 3, 1917?

A. That same period didn't exist.

Q. Well, when did Dr. Trader first begin to send prescriptions to that store?

A. In July, 1916.

Objected to by counsel for defense, that there is no evidence that Dr. Trader did send prescriptions there.

Q. Well, what do the records show?

A. The first prescription records, which I have taken from the books, were in July, 1916.

Q. From that period, how many prescriptions by Dr. Trader were filled at the Joseph Fleming & Son Company store?

A. There were 4,442 prescriptions, calling for 7,358 drams of sulphate of morphine, 3,975 one-half grain morphine tablets, 3900 one-quarter grain morphine tablets.

Q. What do the records of the Joseph Fleming & Son Company show with respect to the number of prescriptions and amounts filled, by other doctors than Dr. Moy and Dr. Trader, by all other doctors than Moy and Trader, in the period from March 1, 1915, to May 3, 1917?

A. By other doctors there were 3,721 prescriptions, for 2,725 drams of sulphate of morphine, 13,950 one-half grain morphine tablets, and 3,250 one-quarter grain morphine tablets.

196 Q. What was the total amount of morphine sulphate sold and dispensed by Joseph Fleming & Son Company from March 1, 1915, to May 3, 1917?

Objected to by counsel for defense, for the reason that the witness has not shown knowledge to give any amounts that were dispensed or purporting to have been dispensed.

Question withdrawn for the present.

Q. Mr. Geist, state what the records of Joseph Fleming & Son Company show as to the amount of morphine sulphate dispensed by them from March 1, 1915, to May 3, 1917?

Objected to by counsel for defense, for the reason that it is immaterial and irrelevant, and for the reason that the testimony is incompetent.

Objection overruled and exception noted to defense.

Mr. Marshall: I ask leave to cross-examine the witness before he gives his answer, if I may be permitted.

By the Court: Very well. I understand he is speaking from the records.

Mr. Marshall: I will ask him that.

Q. First, I will ask you if, in your answer to this question, you based it upon the records which are present in Court here?

A. I base it on the figures which were taken at the time that I took this inventory and the time that I took the prescriptions and compiled the prescriptions and made my recapitulation to the office.

Q. Did you find all of the prescriptions from which you compiled your record, in Joseph Fleming & Son Company on May the 3d?

A. I presumed I had them all.

197 Q. Were there not some of them in the Federal Building at that time?

A. What time are you speaking of now, at what date?

Q. Well, I will withdraw that question and put it in a different form. Weren't there some of the records from which you compiled your report in the Government building here at the time you went into possession of the Fleming drugstore on the 3d of May?

A. I think there were two books here in our office, yes, sir, upstairs in the vault.

Q. Did you know anything about the prescriptions—being other records—which had been taken from the Fleming drugstore during the time from the first of March, 1915, down to the time of May 3d, on which you made this compilation?

A. No, sir.

Q. You did not?

A. No.

Q. Do you know whether the records that you had, by which you made your compilation, are all the records which were secured by the Government between the first of March, 1915, and the third of May, 1917, from the Joseph Fleming & Son Company?

A. I only compiled my figures from what I had on hand at that particular time.

Mr. Marshall: Then I renew my objection if the Court please, that this is incompetent and irrelevant.

Mr. Humes: I would like to ask the witness one question in connection with the qualification of the witness that has been undertaken here.

198 Q. Mr. Geist, state if the compilation that you have made is based upon the records of the Fleming Drug Company kept and preserved as is required by the provisions of the Harrison law and the regulations thereunder, and if they were delivered to you as the complete records of the company, as observed under the law?

Mr. Marshall: Objected to, first, as leading; and, second, that the witness has already answered the question, that he didn't know whether these are all the records, but simply knows that they were

the records that he had. And how could he know when he wasn't here until the 29th of April?

By the Court: Well, the witness may state, in the first place, from what he made his compilation.

Mr. Marshall: He has already done that.

Mr. Henry: I would like to ask the witness a question.

Q. Mr. Geist, the compilation as to the amount dispensed on prescriptions was taken from these records in evidence, the books and the bundles of prescriptions?

Mr. Marshall: He has already stated that. I object to it, for the reason that he has already stated that that is what it was taken from, from these records that are now in court. And my objection *is* that they were not all the records; and we couldn't produce them, and you have not laid the proper ground to show that these were all the records that the Joseph Fleming & Son Drug Company had down there, for the two years, from 1915 to 1917.

199 Mr. Humes: Our purpose is to show by this witness a summary of the evidence that has been presented here in the form of these books and in a form that it is necessary to digest, in order that the Jury and the Court or anybody else can understand it.

By the Court: I think that would be competent.

Mr. Marshall: If the testimony is relevant to the issue, there is no objection to his making a compilation; but if the purpose of offering this evidence is to show that there is a discrepancy between the amount purchased and the amount as dispensed from these records, and then to argue to the Jury as to where the balance of this morphine went, and that they didn't keep their records properly, that is a different proposition.

By the Court: That might be a separate consideration. But as I understand the evidence that he is now giving, it is a compilation of what the books offered in evidence show with regard to the amount of sales. And that would be competent.

Mr. Marshall: There is no allegation in this indictment that there is a shortage or an improper record kept.

By the Court: Well, really, that question of shortage has not been raised here.

Mr. Marshall: Well, I think it is due us to know whether this evidence is offered for that purpose. And I ask them for what purpose it is offered.

200 Mr. Humes: The Government wishes to state that this question is asking for a combination of the amount dispensed on the prescriptions that are shown in evidence and also what has been dispensed on order form.

By the Court: As shown by the records in evidence, the books and the order forms?

Mr. Humes: Yes, sir.

By the Court: Well, that would be competent. The objection is overruled, and an exception noted for defense.

Mr. Henry:

Q. Mr. Geist, state the amount dispensed on prescriptions by Joseph Fleming & Son Company, that is the amount of morphine sulphate, from March 1, 1915, to May 3, 1917, as shown by the records in evidence.

It is understood that this is taken subject to previous objection made by counsel for defense, and objection overruled and exception noted.

A. The total morphine sulphate that was dispensed on prescription from March 1, 1915, to May 3, 1917, was 25879 drams of sulphate of morphine; and on Government order forms 119 ounces; making a total of 3,353 ounces and 7 drams.

Q. Were there any tablets dispensed on prescription?

A. There were. The total amount of morphine tablets dispensed on prescription from March 1, 1915 to May 3, 1917, were 67,845 one-half grain morphine tablets, and 43,470 one-quarter grain morphine tablets.

Q. On May 3, 1917, when you made this inspection, state whether or not your inventory shows the amount of morphine sulphate
201 that was on hand at that time?

Objected to by counsel for defense, as immaterial and irrelevant. Pending a ruling on this question, a recess was taken until 1:30 P. M.

202 Afternoon Session.

Wednesday, December 19, 1917.

CHARLES GEIST on the stand.

Direct examination (resumed).

Mr. Henry:

Q. Mr. Geist, on May 3, 1917, when you made this inspection, state whether or not your investigation shows the amount of morphine sulphate that was on hand at that time?

Objected to as incompetent and irrelevant.

Mr. Humes: If the Court please, we offer to show by this witness the quantity of morphine sulphate that was on hand at a given time, being a time within the period of the alleged conspiracy, for the purpose of showing, in connection with other testimony to be hereafter produced, that such a quantity of morphine would not be in the hands of a drug store in the conduct of a lawful business, and that it was in disregard of the well recognized general practice of druggists to carry that quantity of narcotic at any one time.

Objection overruled and an exception noted to defendant.

A. Yes, sir, I have that figured.

Mr. Humes:

Q. What was it?

A. The amount of morphine on hand on May 3, 1917, was 1040 ounces and seven drams, sulphate of morphine.

Q. How many bottles, such as have been produced here, would that be?

A. 8,327 bottles. Right there I want to qualify by saying that there was at that time—the exact figure I have here—37 or 47 one-ounce bottles in glass—I am figuring this on the basis of eighths.

203 Q. In other words, out of the thousand and some odd ounces, there were some thirty or forty of the amount that was in one ounce receptacles rather than one dram receptacles?

A. That is true.

Q. When you went to the Fleming drugstore to make this inspection, what did you demand from them?

A. When I first went to the store of the Fleming Drug Company, I seen Mr. Arnold Staley, and I asked him for the records of the prescriptions, and asked to take an inventory of the stock on hand that day.

Q. Was anything said about anything else?

A. There may have been something said. As I remember it, when he gave me these books——

Q. Was anything said about order forms?

A. Yes, sir; I got order forms, if that is what you mean; I include that in the narcotic records. I have records of the order forms as well as the prescriptions.

Q. When you requested all his narcotic records, as you say you did, what did he give you?

A. He gave me the duplicate government order forms that we have here, and the prescriptions and several—I think two or three—small packages done up of loss prescriptions that they had not pasted in the books.

Q. Why did he say, if he said, they were not pasted in the books?

A. As I remember it, Mr. Staley said he didn't have a chance to paste them in the books, as the book he had with the numbers following the numbers he had there was at the other office.

Q. In making your inspection, did you check through the prescription numbers of the Fleming Drug Company on the prescriptions which were given you?

A. From time to time, I noticed, and especially at one time I noticed a break in the notation. I can't say which book that 204 was in. It was either on a slip of paper or written on one of those leaves—an omission of a certain number, from a certain number to another certain number, and at that time I believe I ran across that at the store and asked Mr. Staley about it, and I think he told me the reason that was made so was that there was a mistake made in figures at that time, and they caught it. I think

that was in this book here, or it is possible I may have found it on the spindle or in this bunch of prescriptions we took at that time.

Q. With that explanation, were there any other missing numbers, numerically, in the files of the prescriptions he gave you?

A. I don't think there were.

Q. And the summary that you made and record which you have testified to was arrived at from those prescriptions?

Mr. Marshall: This is objected to as leading, and the witness has already testified to that.

The Court: I think he has so stated.

Mr. Humes:

Q. Were there or were there not any missing prescriptions with reference to the numerical order, excepting the one skipped, that you have testified to, in the prescriptions that were turned over to you, and that were the basis of your summary?

A. I don't think there was; no, sir.

Q. Now, Mr. Geist, in your inspection and investigation of the narcotic records of the Fleming Drug Company, what did you find as to the narcotic sales and *and* purchases balancing?

Mr. Marshall: Objected to, for the reason that it is immaterial and irrelevant to the question in issue, and incompetent under the indictments.

The Court: He may state what the facts are. The objection is overruled and an exception noted to defendant.

A. There was a difference.

205 Q. How much was that difference?

A. A difference of 202 ounces and 7 drams.

Q. On which side of the ledger was that difference?

A. A shortage.

Q. Shortage of what?

A. Morphine sulphate.

Cross-examination.

Mr. Marshall:

Q. Mr. Geist, in making up your list, what amount of morphine sulphate did you find had been sold as a result of prescription No. 4327?

A. That is the first time I have ever seen that number there, to my knowledge. I never paid any attention to that.

Q. Is there any way you could tell how much morphine sulphate had been furnished as a result of prescription 4327?

A. I have no way of knowing.

Q. Do you know whether that sheet was loose at the time you got this, or whether it became loose?

A. I didn't take this book at all.

Q. This book was in the Internal Revenue Office when you went down there on May 3rd?

A. Yes, sir.

Testimony of Dr. Adolph Koenig and C. G. Llewellyn.

Pages 242 to 252, Inc.

Dr. ADOLPH KOENIG, a witness on behalf of the Government, having been duly sworn, testifies as follows:

Direct examination.

Mr. Henry:

Q. Dr. Koenig, where do you live?
A. Edgewood, a suburb of Pittsburgh.
Q. Have you an office in the City of Pittsburgh?
A. I do, in the Westinghouse Building.
Q. Of what school are you a graduate?
A. Bellevue Hospital Medical College of New York.
Q. What year did you graduate?
A. 1879.
Q. Have you practiced medicine continually since that time?
A. Constantly since '79.
Q. What hospitals have you been connected with in that time?
A. I have been connected with the Allegheny General, and am now on the consulting staff of the West Penn.
Q. Have you ever treated narcotic patients?
A. I have, just in the ordinary course of my practice; I have not made any specialty of treatment of that kind.
Q. Have you ever treated addicts to morphine sulphate?
A. I have.
Q. Have you ever written any works on that?
A. I have not.
Q. Have you ever taught that subject anywhere?
A. For a matter of twenty years, I was professor of materia medica and botany in the Pittsburgh School of Pharmacy, and later in the University of Pittsburgh, where it became part of my duty to speak on that subject to the students in the college.

Q. Is there a general practice among physicians as to prescribing morphine sulphate to addicts?

A. There is.

Q. State it, doctor.

Mr. Marshall: Objected to as immaterial and irrelevant, first, and in the second place as incompetent; and we also object to the witness as incompetent.

The Court: The objection is overruled and an exception is noted to the defendant. This testimony is taken subject to this objection.

(Question read.)

A. There are several plans of treating morphine habitues, persons addicted to the use of morphine; one, for instance, is to deprive them of the morphine absolutely and entirely, at once.

That has some advantages and some disadvantages. Some men claim that is the way to treat it, and others object to it slightly. In order to gradually deprive patients of the amount—For instance, I have known it to be done where certain——

Mr. Marshall: Wait a moment. I object to this witness giving a statement of what he has done. The question asked him was simply whether there was a general practice among physicians as to the manner of prescribing for addicts.

The Court: As I understand it, he is explaining the two methods.

The Witness: There are three or four methods. It interferes with my method of testifying to be broken into, in the midst of my explanation.

The Court: You may proceed to state the different methods.

208 A. (continued). The gradual method is where, say for the matter of argument, you would place ten grains of morphine in a six-ounce bottle, and give the patient a teaspoonful several times a day, and every time you take a teaspoonful out, you put in a teaspoonful of water, and so gradually the bottle would contain mostly water. But that has its disadvantages also. Then there is another method, under which the morphine is withdrawn within the course of about a week, and that is apparently the most successful method, where every day a little less is given. Another method is to substitute something else, some mild narcotic like bromide of potash. All of these methods, according to modern teaching, for the best results, require that the patient should be in an institution where he can be kept under control. May I tell the jury what was my own practice during last June, when a number of patients were deprived of their morphine, owing to state legislation?

The Court:

Q. Is it what your actual experience was, in carrying out one of these methods?

A. No; what I did when such patients came to me for treatment.

The Court: If there is no objection, I think perhaps that would be proper.

Mr. Marshall: This is, of course, all taken under objection.

The Court:

Q. You may proceed.

A. When the state legislature passed additional laws preventing the sale of morphine during the last spring, a number of patients were unable to obtain morphine, and of course they were very nervous and applied to various physicians and to the city authorities, and some three or more were sent to me, as a state representative, and I, feeling that nothing could be done for them unless they were placed in an institution, gave two of them, at least, a

209 letter to a member of the staff of the St. Francis Hospital, and insisted that the hospital take in those people gratis,

where they could be properly treated, according to my notion. I personally refused to treat them, because I was not a member of the St. Francis staff, where they had wards for patients of that kind. That is my own attitude in that matter. That is the way a patient can most usually be cured of that habit, and it requires not only a matter of a week or two, but they should be retained in an institution of that kind about two months, so as to get together their morale again, so as to be able to resist it, even though they are off it, which they do not have when they are on their own responsibility.

Mr. Henry:

Q. The general practice then among physicians in treating addicts of morphine sulphate is to keep them in seclusion?

A. That is the modern practice.

Q. Is it the general practice among physicians, or tell us what is the general practice among physicians, as to whether more money is charged when prescribing morphine sulphate than when prescribing any ordinary prescription?

A. Absolutely there is no difference. It has no influence on physicians.

Q. What are the general charges?

A. Office charges depend on the part of the city where the physician is located—one dollar, two dollars, and so on.

Q. In writing prescriptions for a patient, who calls at an office to have a prescription written, after an examination, what is the general practice?

A. I don't understand the question.

Q. Is there a general practice among physicians as to the charge for a prescription?

A. As to the amount?

Q. Yes.

A. There is; as a rule, two dollars a prescription, but it de-
210 pends upon the amount of examination required. Some patients have to be examined for a half or one or two hours possibly, and they are charged more.

Q. Under the general practice, should a prescription calling for sixteen drams of morphine sulphate be charged for at the rate of sixteen times the charge of a prescription for one dram?

A. There should not be a particle of difference, and there is not among reputable physicians.

Cross-examination.

Mr. Marshall:

Q. How many addicts have you treated?

A. Over almost forty years, I am unable to say—possibly five or six or seven or eight—something like that.

Q. And all of your other information on this subject has been gathered from what?

A. Has been gathered from experience and as I have gone along and from reading.

Q. Reading what books?
A. For instance, J. C. Wilson, of Philadelphia,—one of his therapeutics.
Q. Did you ever read Prof. Wood's book?
A. Which Wood?
Q. Of Philadelphia?
A. There are two Horatio C. Woods, of Philadelphia, Horatio the elder and Horatio the younger.
Q. H. C.?
A. There are two H. C. Woods.
Q. Well, the younger.
A. I have read some of his writings.
Q. When you gave us the treatment of addicts, that is, to effect a cure?
A. That is the idea.
Q. You are not attempting to give us the treatment of addicts to give them enough morphine to keep them at work?
211 A. There is no such treatment recognized. The treatment is to cure.
Q. How do you know that?
A. As a physician.
Q. From reading?
A. From personal experience and reading.
Q. You only treated eight or ten in forty years?
A. I have known other people treating them. I don't make this a specialty, but I have treated cases.
Q. Eight or ten in forty years?
A. Yes, sir.
Q. Do you or don't you know that there are hundreds and hundreds of men in Pittsburgh that are performing their daily labors and are still addicts to morphine sulphate?
A. I do not know it.
Q. Would you say that there were not?
A. I have not investigated that. There are evidently some, from my experience during the past summer. If I may explain myself, I am a member of the Advisory Board of the State Department of Health, and as such, some of these men were referred to me by the City Health authorities, and these very men, and women, I advised and made every effort to get them into a hospital. That is my own personal knowledge.
Q. What was the largest amount of morphine consumed daily by any of those addicts that you treated?
A. I can scarcely give that, except possibly about two or three grains.
Q. A day?
A. That is according to my indefinite recollection.
Q. Did you ever have any experience with patients who had used or were using fifteen to thirty grains a day?
A. I don't think I did.

212 G. C. LLEWELLYN, a witness called on behalf of the Government, having been duly sworn, testifies as follows:

Direct examination.

Mr. Henry:

Q. You are the collector of Internal Revenue for the 23rd Internal Revenue District?
A. Yes, sir.
Q. Allegheny County, State of Pennsylvania, is part of your district?
A. Yes, sir.
Q. Will you state whether or not Jos. Fleming & Sons' Co. has registered with your office under the Harrison Narcotic Act?
A. They have.
Q. Were they registered during the year commencing July 1, 1916?
A. Yes, sir.
Q. Have you the registry record?
A. I have.
Q. Are they registered for the year commencing the first of July, 1917?
A. They are.
Q. Have you that registry record?
A. Yes, sir.
Q. Is Dr. Jin Fuey Moy, during the year commencing July 1, 1916, registered under the Harrison Act, in your department?
A. He is.
Q. Have you the original record of Dr. Moy?
A. I have.
Q. Is he registered in the year commencing July 1, 1917?
A. Yes, sir.
Q. Have you that original record?
A. Yes, sir.

(Papers marked Exhibits 38, 39, 40, 41.)

Q. Are the registery records to which you have just testified the papers marked Exhibits 38, 39, 40 and 41?
A. They are.

(No cross-examination.)

212½ *Testimony, Pages 267 to 274, Inc.*

(By Order of Court.)

213 Mr. Henry: Counsel for the Government offer especially in evidence prescription of Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa., March 29, 1917, to Dave G. Feigel, 410 Payne Avenue, Cleveland, Ohio, 12 drams morphine sulphate Sig., Use as directed. U. S. Registry No. 4445, 23rd District

Pennsylvania. H19643, 3/29/17, Jin Fuey Moy, being the prescription set out in count 1 of the indictment at No. 89 November Term, 1917.

Mr. Dunkle: For what purpose?

Mr. Henry: They have been admitted in evidence and testified to as being filled.

Mr. Dunkle: I understand there is no testimony that they were ever filled. It is objected to as incompetent, irrelevant and immaterial.

Objection overruled and exception noted to defendant.

Mr. Henry: Counsel for the Government also offer in evidence prescription of Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa., April 28, 1917, to Henry McKnight, 48 Sibley Street, Detroit, Michigan, Morphine sulphate, 12 drams. Sig., Use as directed. Jin Fuey Moy. H20684. 4/28/17. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set out in Count 2 of the indictment at No. 89 November Term, 1917.

Mr. Dunkle: We want a general objection to all these offers.

The Court: This is one of the prescriptions already offered in evidence. The objection is overruled and an exception noted to defendant.

214 Mr. Henry: Counsel for the Government also offer in evidence prescription of Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa., March 30, 1917, to Harry Lyman, 3242 Cedar Avenue, Cleveland, Ohio, morphine sulphate, 12 drams. Sig., Use as directed. H19665, 3/30/17. Jin Fuey Moy. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being prescription set out in the Fourth Count of the indictment, at No. 89 November Term, 1917.

Mr. Stadfeld: We ask for an exception to the offer of these, on behalf of the Fleming Drug Co.

Exception allowed.

Mr. Henry: Counsel for the Government also offer prescription of Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa., April 6, 1917, to Harry Lyman, 3242 Cedar Avenue, Cleveland, Ohio, morphine sulphate, 16 drams. Sig., Use as directed. H19804, 4/6/17. Jin Fuey Moy. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set forth in the fifth count of the indictment at No. 89 November Term, 1917.

Also, prescription of Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa., April 16, 1917, Harry Lyman, 3242 Cedar Avenue, Pittsburgh, Pa., morphine sulphate, 16 drams. Sig., Use as directed. H20225, 4/16/17. Jin Fuey Moy. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set forth in the sixth count of the indictment, at No. 89 November Term, 1917.

Also, prescription of Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa., May 8, 1917, Harry Lyman, 3242 Cedar
215 Avenue, Cleveland, Ohio, morphine sulphate, 14 drams. Sig., Use as directed. Jin Fuey Moy. 5/8/17. H21073. U. S.

Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set forth in the seventh count of the indictment, at No. 89 November Term, 1917.

Also, prescription of Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa., April 7, 1917, Albert Williams, 3903 Superior Avenue, Cleveland, Ohio, morphine sulphate, 16 drams. Sig., Use as directed. H19935. 4/7/17. Jin Fuey Moy. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set forth in the eighth count of the indictment at No. 89, November Term, 1917.

Also, prescription of Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa., April 1, 1917, Harry Goldbaugh, 1022 East Fortieth Street, Cleveland, Ohio, morphine sulphate, 12 drams. Sig., Use as directed. Jin Fuey Moy. 4/1/17. H19741. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set forth in the ninth count of indictment at No. 89 November Term, 1917.

Also, prescription of Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa., April 6, 1917, John Henry, 1562 Curtis Avenue, Cleveland, Ohio, morphine sulphate, 16 drams. Sig., Use as directed. H19903. 4/6/17. Jin Fuey Moy. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set forth in the tenth count of the indictment at No. 89 November Term, 1917.

Also, prescription of Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa., April 27, 1917, John Henry, 1732 Curtis Avenue, Cleveland, Ohio, morphine sulphate, 12 drams. Sig., Use as directed. Jin Fuey Moy. H20654. 4/27/17. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set out in the eleventh count of the indictment at No. 89 November Term, 1917.

Also, prescription of Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa., April 25, 1917, John Lyon, 245 West Rich Street, Columbus, Ohio, morphine sulphate, grains CCXL. Sig., Use as directed. Jin Fuey Moy. 4/25/17. H20578. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set out in the twelfth count of the indictment at No. 89 November Term, 1917.

Also, prescription of Jin Fuey Moy, 308 Grant Street, Pittsburgh, Pa., April 28, 1917 John Lyon, 245 West Rich Street, Columbus, Ohio, morphine sulphate, grains CCXL. Sig, Use as directed. Addict. Jin Fuey Moy. #20708. 4/28/17. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set out in the thirteenth count of the indictment at No. 89 November Term, 1917.

Also, prescription of Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa., April 9, 1917, Harry Aarons, 519 East 65th Street Cleveland, Ohio, Morphine sulphate. Sig., Use as directed, 15 drams. Jin Fuey Moy. 4/9/17. H19994. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set forth in the fourteenth count of the indictment at No. 89 November Term, 1917.

Also, prescription of Jin Fuey Moy, M. D., 308 Grant Street,

Pittsburgh, Pa., April 22, 1917, Jack Davis, 2574 East 50th Street, Cleveland, Ohio, morphine sulphate, 10 drams. Sig. Use as directed. 4/22/17. H20465. Jin Fuey Moy. U. S. Registry No.
217 4445, 23rd District of Pennsylvania. Being the prescription set forth in the fifteenth count of the indictment at No. 89 November Term, 1917.

Also, prescription of Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa., April 22, 1917, Harry Moore, 2111 Ninth Avenue, Altoona, Pa., morphine sulphate, 13 drams. Sig., Use as directed. Jin Fuey Moy. H20462. 4/22/17. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set forth in the sixteenth count of the indictment at No. 89 November Term, 1917.

Also, prescription of Jin Fuey Moy, M. D., 308 Grant Street Pittsburgh, Pa., April 26, 1917, Emily Kate, 410 Fifth Street, Canton, Ohio, morphine sulphate, 16 drams. Sig., Use as directed. Addict. Jin Fuey Moy. H20627. 4/26/17. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set forth in the seventeenth count of the indictment at No. 89, November Term, 1917.

Also, prescription of Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa., April 29, 1917, Herman Webber, 910 Liberty Avenue, Pittsburgh, Pa., morphine sulphate 16 drams. Sig., Use as directed. Jin Fuey Moy. H20756. 4/29/17. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set forth in the eighteenth count in the indictment at No. 89 November term, 1917.

Also, prescription of Jin Fuey Moy, 308 Grant Street, Pittsburgh, Pa., May 2, 1917, Joseph Whalen, 1432 Broadway, Brooklyn, New York, morphine sulphate, 16 drams. Sig., Use as directed. Jin Fuey Moy. 5/2/17. H20862. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set forth
218 in the nineteenth count of the indictment at No. 89 November Term, 1917.

Also, prescription of Jin Fuey Moy, M. D., 308 Grant Street, Pittsburgh, Pa., May 7, 1917, Paul Stein, 2248 Wabash Avenue, Chicago, Ill., morphine sulphate, 16 drams. Sig., Use as directed. Jin Fuey Moy. 5/7/17. H21031. U. S. Registry No. 4445, 23rd District of Pennsylvania. Being the prescription set forth in the twentieth count of the indictment at No. 89 November Term, 1917.

218½ *Testimony of John D. Milligan.*

Pages 275 to 282, Inc.

219 JOHN D. MILLIGAN, a witness called on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

Mr. Henry:

Q. Where do you live?
A. In Pittsburgh.

Q. Are you a practicing physician?

A. Yes, sir.

Q. And surgeon?

A. Yes, sir.

Q. Where did you graduate, doctor?

A. At Bellevue Hospital Medical College, New York City, March 1, 1876.

Q. Have you been practicing medicine continuously since you graduated, doctor?

A. Yes, sir, continuously since that time.

Q. Where have you practiced in that time and what have you done in the line of practice?

A. In the general practice of medicine in Westmoreland County, Pennsylvania, for possibly fourteen years, at Greensburg for a year, and at Owasa, Michigan, for nearly two years, and in Pittsburgh for twenty-five years December 1st of this year.

Q. Have you been connected with any hospitals, doctor?

A. I have been in connection with the West Penn Hospital, and also at the present time with the South Side Hospital.

Q. During this period, have you treated users of morphine?

A. I have treated some cases of users of morphine.

Q. Have you ever treated addicts to the use of morphine?

A. Yes, sir, directly and with my assistant in consultation.

Q. What is morphine?

A. It is a product of opium; it was discovered about 1803, by Sir Turner, and given to the profession in 1817, one hundred years ago. It is one of the active principles of opium, representing
220 in strength about eight times the strength of opium. In other words, comparing grain for grain, one grain of morphine would represent about, of the average opium, eight grains of opium.

Q. What quantity of morphine sulphate would be deadly to an ordinary individual who is not an addict?

A. The dose to an ordinary individual is from one-eighth to one-fourth,—that is the average dose. One half grain doses are sometimes given, following severe burns or severe injuries, but that is the maximum of one single dose in ordinary practice.

Q. What is the effect of the continued use of morphine on a person who uses it?

A. The effect on an individual would be to lead him from one period of hallucination to another, until he becomes an abnormal man, so far as his mentality is concerned. It disturbs his mentality, and of course also disturbs his general physical condition.

Q. In what way, to better or deteriorate it?

A. To deteriorate, the same as alcoholism.

Q. You say — have treated addicts to the use of morphine sulphate. Will you describe the treatment among physicians?

A. In such cases as have come under my observation, the treatment has been to reduce the dose, in some cases immediately, taking care of the effect by gradually supplanting the defect by such stimulation as would take care of the case, to tide the case over. Usually, a half dose—If the treatment was to be continued by re-

ducing the dose,—about half the dose, then diminish that the next day, and give good liberal tonics to replace the effects of the withdrawal of the drug suddenly.

Q. Can you treat an addict without having him in custody under your control?

A. No, you can't treat him successfully, without he is absolutely under control, in the hospital or in jail, or some place where he can be properly controlled, although I recall several instances where the cases were treated successfully without confinement; but they were under restraint by their friends, and by their own efforts
221 with full decision to become cured, had made an effort and succeeded. These were cases where the quantities were within reasonable amount, before they had been long continued cases,—cases going over two or three or four years, probably, with a minimum quantity of morphine used.

Q. Doctor, what would be the ordinary fatal dose to an individual?

A. A fatal dose—One grain of morphine is consideres a lethal dose—that is fatal. Death has occurred from as low as one-sixth of a grain in a number of cases.

Q. Is there a general practice among physicians as to the charges for writing a prescription, whether the charges for sixteen drams of morphine sulphate would be sixteen times as great as the charge for writing a prescription for one dram?

A. The custom and practice of the medical profession in Allegheny County, with which I am well acquainted, has a fixed price for prescriptions.

Mr. Marshall: This understood to be taken under objection.

The Court: Yes. The objection is overruled and an exception noted to defendant.

A. (continued). The price of a prescription is based by the physicians of the city on their office work. An examination and prescription, if needful, would be a charge varying from three to five or ten dollars. A number of the most leading men of the city have a fixed fee of ten dollars as their examination and prescription fee, or their examination and prescription or opinion, as the case requires. In the general practice throughout the city, speaking now of the residential section and the sections where the doctor as a rule has his office and home together, the fee varies from one to two dollars for examination and prescription. Prescriptions are not charged for in proportion to ingredients, or anything of that type or sort. They are based on the requirements of the case. That is the
222 practice in this county and throughout the state.

Q. Is there a general practice among physicians as to prescribing morphine sulphate for addicts.

A. I don't think so. I know of nobody that does prescribe——

Q. You don't understand the question. Answer yes or no, if there is a general practice. Then you may define what the practice is, later.

A. No, there is not a general practice to prescribe for addicts on the basis of the prescription alone.

Q. You don't understand me.

Mr. Marshall: I object to Mr. Henry declaring to the witness that he doesn't understand. The question was repeated to him, and he made the same answer both times.

(Question read, as follows: "Is there a general practice among physicians as to prescribing morphine sulphate for addicts?")

A. No.

Mr. Henry:

Q. What do you mean by that, doctor?

A. There is a general practice to try to cure these cases, by sending them to hospitals and to jail, if necessary. That is the general practice of the physicians of the county.

Cross-examination.

Mr. Marshall:

Q. Doctor, a narcotic drug addict presents a definite, physical, diseased condition, presenting constant and definite physical symptoms and signs, progressing through clean-cut clinical stages of development, explainable by a maximum of body protection against the action of narcotic toxins, accompanied by inhibition of function and autotoxemia, often displaying deterioration and psychosis,
223 which are intrinsic to the disease, but the result of toxemia, mal-nutrition, anxiety, fear and suffering; is that true?

A. I would like to have you just state if that is a morphine topic you are talking about.

Q. It is your answer, given in another case, about the same thing. That is what I am reading from. Is it true?

A. With morphine, yes.

Q. And isn't it a fact that this drug, if taken away from these people at once, the result is, in a general way, that the symptoms are a vague uneasiness and restlessness, and signs of depression, followed by yawning, sneezing, excessive mucous secretion, sweating, nausea, uncontrolled vomiting and purging, twitching and jerking to violent jactitation, and intense muscular cramps and pains, abdominal distress, marked circulatory and cardiac insufficiency and irregularity, pulse going from extremes of slowness to extremes of rapidity, with loss of tone, facies drawn and haggard, pallor deepening to greyness, exhaustion, collapse and in some cases death?

A. Yes, sir.

Q. To what extent did the addicts that you treated use morphine?

A. Less than ten grains daily.

Q. You never treated any addicts who were taking morphine to the extent of from 15 to 100 grains per day?

A. I have not. I have seen a case in consultation which we were uncertain as to the extent, but it ran up in that neighborhood some where. That case we placed in jail, and he never had any further trouble. He never received a dose of morphine after he reached the jail, and made a good recovery, and unfortunately he was one of our medical profession.

Q. To what extent did he use morphine?
A. It was said he used 30 or 40 grains a day.
Q. Didn't you say, at the last trial, that you never heard of any person taking more than ten grains a day?
A. I have heard, by reading or otherwise, but I have never
224 seen a *a* case where I had positive evidence of a man taking more than ten grains a day. I have knowledge of a case of a man coming to my office, taking ten grains at a dose, hypodermically, but I didn't give the morphine. I never gave to one individual more than one grain and a half in thirty-six hours, and that was a very severe case of burns, where I gave one-fourth of a grain, and later a half grain.
Q. Did you make this answer? "You said you never had a case that used ten grains a day, except this one that came in." (A.) I have been in consultation with some cases which ran in the neighborhood of that, but they were reduced to a half grain immediately, and soon got better. Personally, I have no knowledge of seeing a case in which ten grains were given a day."
A. Yes, sir, that is correct; but since that was talked over, I believe that the case I referred to did reach a point of more than ten grains, but I had never seen a case at the time of that trial that used more than that amount, that I could be certain of.
Q. One of the authorities that you quoted in your testimony at the last trial was Prof. H. C. Wood, of the University of Pennsylvania?
A. Yes, sir.

224½ *Testimony of John A. Frew.*

Pages 285 to 287, Inc.

225 JOHN A. FREW, recalled for further cross examination, testified as follows:

Mr. Marshall:

Q. Is it a fact that you were convicted and sentenced to the penitentiary?
A. Yes, sir, it is.
Q. And isn't it a fact that you were convicted more than once, and sent to more than one penitentiary?
A. It is.
Q. How many different penitentiaries?
A. Two.
Q. One in Columbus?
A. Yes, sir.
Q. And the other one where?
A. In Minnesota.

Mr. Humes:

Q. Were you addicted to the use of morphine or opium or narcotics at the time of these occurrences?

A. At both times.

Mr. Marshall:

Q. Didn't you testify yesterday that the first time you became addicted to morphine was about two and a half years ago?
A. I did.—to morphine. Opium is not morphine.
Q. Then you made the distinction between morphine and opium?
A. I did.
Q. How old are you?
A. Twenty-eight.
Q. How long ago was the first time you were sent to the penitentiary?
A. 1911.
Q. That is six years ago?
A. Exactly.
Q. What were you sent for?

226 Objected to as not proper cross examination.

The Court: If the witness chooses to answer, he may.
The Witness: May I ask the Court a question: I was convicted of that crime and I have paid the penalty. I admit it, and that's enough.
The Court: As I explained yesterday, it is a question of privilege on your part.

Mr. Humes:

Q. In what form did you use narcotics before you commenced using morphine Sulphate.
A. I smoked opium.
Q. Were you addicted to the habit of smoking opium at both times you were convicted, that you have testified of?
A. Yes, sir, that was the cause of my downfall.

Mr. Marshall: I ask that the answer be stricken from the record as not responsive.
The Court: The motion to strike out is overruled, and an exception noted to defendant.

Court here adjourned until 10 o'clock A. M. Thursday, December 20, 1917.

226½ *Testimony of Dr. Sidney D. White.*

Pages 291 to 305, Inc.

227 Defendant's Case.

Mr. Marshall opened for the defense.

DR. SIDNEY D. WHITE, a witness called on behalf of defense, sworn, testified as follows:

Direct examination.

By Mr. Marshall:

Q. You are a regularly registered physician in the State of Pennsylvania?
A. I am.
Q. And have been for how long?
A. For about twelve years.
Q. Of what school are you a graduate?
A. I am a graduate of Baltimore Medical College.
Q. I believe that is one of the old, well established schools?
A. It is, yes, sir.
Q. And in what year did you graduate from that institution?
A. In 1893.
Q. You have been practicing for twenty-four years, then?
A. Yes, sir.
Q. After your graduation from that institution, what did you do?
A. I was in practice for a few months, and then went into sanitarium work in Warsaw, Indiana, in 1894.
Q. And what was that sanitarium?
A. Well, that was an institution for the treatment of drugs and alcholics.
Q. And when you say "drugs" what drugs do you mean?
A. Well, that included morphine and its derivatives, chlorals and bromides, and all habit-forming drugs.
Q. I see. Those who are addicted to the use of drugs?
A. Yes, sir.
Q. How long did you remain at that institution?
A. I remained there up until 1904.
228 Q. That is, from 1893, after your two years of practice, you say?
A. No, a few months. I went to Warsaw in 1894, and came to Pittsburgh in 1904.
Q. You then left the Warsaw sanitarium?
A. We called it the Plymouth institution, that time.
Q. And how may patients who were addicted to the use of morphine sulphate, or other derivatives of opium, did you treat in that sanitarium, during that time?

A. Well, I can't tell you. We carried from twenty to twenty-five patients all the time.

Q. And what percentage of those would be addicts?

A. Well, not over five per cent of drugs.

Q. Then after you came to Pittsburgh, in 1904, what work did you take up here?

A. I went into the East End Sanitarium.

Q. How many patients did you have there on an average?

A. We had twenty-one beds for patients, and they ran from ten to twenty-one patients.

Q. And what percentage of those were addicts to drugs?

A. There was about the same percentage. I am not giving you a really accurate percentage.

Q. No, about?

A. About five per cent of them.

Q. And after you ran the Plymouth Sanitarium in the East End——

A. No, the Plymouth Sanitarium was in Warsaw, Indiana. And then came to the East End Sanitarium, which was a sanitarium that my brother and I ran.

Q. Were you in charge?

A. Yes, sir.

Q. Have you a sanitarium at the present time?

A. Yes, sir, at 3623 Perrysville Avenue, North Side.

Q. That is in the heart of the residence district of Allegheny?

A. Yes, right across from the Observatory.

229 Q. How many patients do you have there on an average?

A. Well, we are low now. We have eleven. But we usually have the house filled. We have about twenty-five to twenty-six beds. This morning we only have eleven patients.

Q. And from what sources do you draw your patrons?

A. Well, our patients come through physicians. We do an ethical business. We don't advertise and never did.

Q. I mean, do you draw from what are known as the better classes?

A. Oh, we treat the best class of people, even if they are addicted.

Q. Have you made any study of the treatment of those addicted to drugs?

A. I certainly have.

Q. Have you made any study of the treatment—that is, I mean for their cure—have you ever made any study of the treatment of them where you couldn't get them in a sanitarium or some place where you could have control of them?

A. No, I never treated them out of a sanitarium.

Q. To what extent do those addicts use this drug?

A. Well, they use it from the fraction of a grain or a few grains to a great quantity. I have treated them all the way from a grain and a half, and in one case, over one hundred grains in twenty-four hours. The average, I would say, usually runs from five to thirty grains in twenty-four hours.

Q. Will you tell the jury what, in your opinion, is the proper treatment for these addicts?

A. The proper treatment?

Q. Yes. For a cure, now?

A. There is but one treatment. And that is gradual reduction and substitution, avoiding shock. That, of course, means a whole lot, but that is the principle you have to work on.

Q. Will you explain that to the jury more in detail?

A. Taking a patient that is taking thirty grains of morphine, you immediately begin to withdraw that as soon as you can, using a substitute, and, as you increase the substitute, you diminish
230 the amount of morphine. All the time studying the patient to avoid shock. The shock that comes from the withdrawal of this drug too suddenly is much like a surgical shock, and in the last of hand- results very frequently in death.

Q. Can you always withdraw the drug by reducing the dose each time or not?

A. No, you cannot.

Q. Explain that to the Jury.

A. The person is influenced, of course, by all those influences which we are influenced by. Sometimes they are altogether different, on account of auto-infection, a disturbance of the alimentary canal, and you may have to run the patient back two or three or four grains a day, in order to hold him comfortable, until you can hold the disturbance in the alimentary canal, which is what we call auto-infection.

Q. You first begin to reduce the dose?

A. Yes, sir.

Q. And then at times you have to go up again, for the benefit of the patient's health and safety?

A. Yes, you have to keep him comfortable.

Q. How long does it take to get the patient down to the point where he is off the opium or its derivatives?

A. Of course, that depends on the condition of the patient, his age and his condition of health, and so on; all the way from a few days to seven or eight weeks.

Q. Ordinarily—of course, I suppose, from your last answer that his age has something to do with it, but ordinarily, does it take longer to get a patient who is using a large amount of the drug than it takes one who is only using a small amount?

A. It does, if the patient is needing that quantity. Sometimes the patient is taking more than he needs.

Q. What does he need?

A. Well, to produce a feeling of well-being, to get the ef-
231 fect, to functionate.

Q. But ordinarily what is the case?

A. With the patients I am treating now, they are not taking much more than they need. I can't cut very much from the start.

Q. I don't think you understand. Ordinarily, is it or not necessary to extend the time over which you take away the drug to a man who is using a large amount, rather than to a man who is using a small amount?

A. It takes longer.

Q. Now, after you have withdrawn the drug, or gotten the patient

in such condition that you can withdraw the drug, then what is your practice?

A. Then, of course, there is a building-up process; enhancing the mentalities and increasing the vitality of the patient.

Q. Building up his health, in other words?

A. Yes, sir.

Q. What is the result usually, if the drug is withdrawn from the patient at once and entirely?

A. Well, they become very restless, and then they become nervous, and then they become excessively nervous, and there is a disturbance of the vasomotor mechanism. The pupils of the eye dilate; the patient don't functionate any more, and soon appreciates collapse. That is, a patient who is addicted, I mean now.

Q. Yes, those are the ones I am talking about now. Doctor, state whether or not, in your opinion, it is necessary ever for the life or for the sustaining of addicts, to give them morphine?

A. It is not a matter of what we want to do; we have to help them, when they are in that shape.

Q. Why is that necessary?

A. Because a withdrawal precipitates these symptoms that I have described and stops functionation.

Q. Stops functionation of what?

A. Well, of the mind, as well as of the body; when I say
242 functionation, I mean of the body and of the mind.

Q. It stops the functional organs of the body from performing their usual functions?

A. Yes, their usual duty or function.

Cross-examination.

By Mr. Henry:

Q. Doctor, you have never treated an addict, except he was under your custody and control?

A. No.

Q. What is the object of your treatment of addicts?

A. Of addicts?

Q. Yes?

A. Why, to put them into normal condition.

Q. That is, to effect a cure?

A. Yes, to effect a cure.

Q. Can you treat an addict by placing four drams of morphine in his hands, and allowing him to have the custody and control of that himself?

A. Well, I don't do that, you know. I administer every bit of morphine that I use.

Q. You would refuse to do anything like that—is that correct?

A. That is right.

Q. Can you treat an addict without making any reduction in the amount that he is using in a month?

A. I can't treat him during that month, no. I have had cases in

my case where there were other troubles, that it was impossible to break off the drug until after the other troubles were cured.

Q. Supposing that your patient has no other troubles and is using ten grains in twenty-four hours, injecting it hypodermically, can you treat him without making any reduction in the amount he is using in the period of a month?

A. No, sir.

Q. Can you diagnose that he is addict, by merely looking
233 at his eye, without making any other examination of the patient?

A. I would say no. There are other diseases that produce the same condition. I have reference to a contracted pupil now. That is not infallible. A dilated pupil is not infallible. A yellowish condition in the conjunctiva.

Q. A yellowish condition in the conjunctiva of the eye, doctor, there are other things that will produce that, aren't there?

A. Yes, sir.

Q. An ordinary bilious attack will cause that?

A. Well, yes, it does.

Q. It is a fact that there are many diseases that give this yellowish condition to the conjunctiva besides morphine.

A. Yes, when I say a yellowish color, I don't mean the peculiar condition that is found in the chronic drug user.

Q. I believe you said in your direct examination that in the treatment of addicts at these various sanitariums with which you have been connected, that the patient, after the reduction process is started by you, is off the drug after a period of time for a few days up to seven or eight weeks?

A. That is, the patient was off the drug after we began treatment?

Q. Yes.

A. Yes, from a few days to seven or eight weeks.

Q. A few days would mean a patient that was not using any large amount?

A. That had not been using it for any length of time and was in good condition.

Q. And even in the worst case they would be off the drug entirely in eight weeks?

A. We never take a patient for less than that time.

Q. But in extreme cases, as I understand you, you have the patient off the drug in eight weeks?

A. Yes, sir.

Q. You said, in your direct examination, that an addict sometimes takes more than he needs?

234 A. Yes, that is true.

Q. And that is true generally?

A. I also stated that I don't find it so much so in my cases over there, but it is quite frequent.

Q. When an addict is out of the drug, isn't it true that he will go to almost any extreme in order to get it?

A. That is true.

Q. And he will lie to get it?

A. Yes.

Q. And he will steal to get it?

A. Yes.

Q. Isn't it true that you find addicts generally addicted to vice and crime?

A. No, I don't find them that way. I treat, I think, the best people in the world, and they are addicted.

Q. And your answer to that question refers only to the people you treat?

A. Yes, I can't answer for others.

Q. How many cases do you treat where they take more than thirty grains?

A. Well, I can't tell you, but I have treated many cases that have taken fifty, sixty or seventy-five.

Q. Well, about how many?

A. I can't tell you that without referring to the books.

Q. How do they usually take it?

A. They usually take it hypodermically.

Q. What is that?

A. That is dissolving the drug in hot water and putting it in a syringe and injecting it under the skin.

Q. How many parts of water will dissolve it?

A. It depends on how hot the water is.

235 Q. Well, say, at room temperature.

A. Well, ten drops will dissolve half a grain—of cold water.

Q. Isn't it true that it takes twenty-one parts at room temperature?

A. No; it takes twenty drops of distilled water at a normal temperature to dissolve half a grain of morphine.

Q. It takes twenty parts of water to one grain?

A. No, I am talking about a half a grain of morphine. That is, including, of course—there is always an antiseptic put in, boric acid, which always detracts from the solubility by the water taking up some of the drug.

Q. When they heat it, state whether or not they are able to inject it at the point to which it is heated, or do they usually have to cool it?

A. Oh, they inject it hot.

Q. How hot?

A. They inject it sometimes pretty hot.

Q. Boiling?

A. No.

Q. About what degree?

A. Well, about blood heat or above blood heat.

Q. But if a man who was going to make an injection had heated it to boiling, he would wait for it to cool?

A. Oh, he just swings his syringe around and it soon cools off.

Q. When it is heated, that has a tendency to thicken the fluid that is to be injected?

A. Yes, they lose a good deal of it in that way.

Q. And if they had a large amount, like ten grains, at one injection, and heated that, that would be very thick, would it not?

A. Syringes usually hold about twenty-five *minimums* of water. That wouldn't be thick, no; it would be in solution.

Q. They can't take ten grains in one injection?

A. Well, they repeat it.

Q. They would have to repeat it how many times?

A. Well, twice. You can put five grains in one syringe of hot water. I really don't use it in that way.

Q. How do you use it?

A. I use it in cold solution.

Q. And that takes a longer time to dissolve?

A. Well, in my work, I have my solutions prepared over night. I standardize them and reduce them to suit the case.

Q. Well, if an addict used it himself and wanted to dissolve it in cold water, it would take it a longer time to dissolve?

A. It is very soluble.

Q. Well, how long would it take?

Mr. Marshall: I don't really care about this, but it is not cross examination.

By the Court: Well, it is going a little outside of cross examination.

Mr. Henry:

Q. Well, a man that uses several grains a day would have to spend most of the day preparing the solution?

A. Well, pardon me, but that would be entirely as you may feel about that. It is facts that I am giving you.

Q. But it would take a good bit of his time?

A. It would take a good bit of his time, although he would use it probably at nights and early in the morning.

Q. And if he is using a hundred grains a day, he would have to make several injections, would he not?

A. Yes.

Q. How many?

A. Well, I can't answer that question without figuring it out. I don't wish to go on record on a guess.

237 Q. If you had a patient in your sanitarium who was taking ten grains a day, injected, how soon would you begin to reduce the amount of the drug, assuming there were no other complications?

A. Just as soon as I could get him in physical condition. That might be twenty-four hours, or it might be forty-eight or seventy-two.

Q. What amount would you reduce it?

A. Well, that would depend altogether on the case. I would reduce it as fast as I could. I couldn't reduce them a grain; I would reduce them a fraction of a grain. That depends entirely on the diagnosis of a particular case. I have never treated two cases of

morphine that I have handled the same. And to answer these questions is ridiculous to me.

Q. Are you familiar with the Towne treatment?

A. I have read of the various treatments.

Q. That is a widely used treatment, is it not?

A. Well, I wouldn't think so. Perhaps it is. I presume the Lamier treatment is more widely used.

Q. Well, in that treatment, the drug is withdrawn entirely in two days, isn't it?

A. Well, I don't use it. I am an authority on these cases myself as they come to me, and I don't ask anybody for a thought on the matter.

Q. Anyway, you wouldn't treat a patient who was not under your control?

A. No, sir.

Q. And you haven't written any prescriptions for an addict for sixteen drams?

A. I have not written any prescriptions that I can remember for an addict.

Q. Not for an addict at all?

A. No, sir.

237½ *Testimony of Dr. E. J. Trader.*

Pages 345 to 357, Inc.

238 Dr. E. J. Trader, called on behalf of defense, sworn, testified as follows:

Direct examination.

By Mr. Marshall:

Q. Doctor, you are a practicing physician in the city of Pittsburgh?

A. Yes, sir.

Q. And have been for how long?

A. Fifteen years, since 1902.

Q. Where is your office?

A. 427 Third Avenue.

Q. Did you keep a record of the prescriptions that you wrote for people for morphine during the month of March, 1917?

A. Yes.

Q. I am fixing that month particularly—although I suppose you kept it for other months, too?

A. All the time.

Q. Have you that record here?

A. Yes, I have it here.

Q. I show you two prescriptions marked Exhibits 20 and 21, and I ask you if those are your prescriptions?

A. Yes, they are mine.

Q. A man by the name of Henry says that he got these two prescriptions under the name of Keith on this date, and that he had no woman with him?

A. He had a woman with him and introduced her as his wife.

Q. Does your record show that?

A. It does.

Book produced and marked Defendant's Exhibit "B" of this date.

Q. I show you Exhibit "B," and ask you if that is your record book.

239 A. That is my record book, yes.

Q. And on the page of this book, under Tuesday, Mar. 22, and Wednesday, Mar. 23—is that a part of your record for March, 1917, as to the prescriptions for morphine?

A. Yes, sir.

Q. Do you find that you gave any prescription to Frank Keith on that day?

A. Yes.

Q. For how much?

A. Four bottles.

Q. Four drams?

A. Four drams.

Q. And did you give a prescription to Mrs. Keith that day?

A. Yes.

Q. How much?

A. Three bottles.

Q. And this is your record, is it?

A. Yes.

Defendant's Exhibit "B" offered in evidence by counsel for defense.

Q. Do you remember whether Keith came into the office by himself or not, and whether he came in afterwards with his wife?

A. He brought his wife in the first time.

Q. How do you account for that prescription between those?

A. Well, possibly that fellow came in and was in a hurry, and I neglected putting her down right away, until I treated that patient, as we often do.

Cross-examination.

By Mr. Humes:

Q. Dr. Trader, you remember the fact of this man Keith coming in with his wife, do you?

A. Yes, sir.

Q. You remember him when you saw him here?

240 A. I do.

Q. Do you remember of seeing him at any other time than the time he came in with his wife and the time that you saw him in court here?

A. Yes, I have seen him before.

Q. At what other times did you ever see him?
A. Well, I have written for him at different other times.
Q. Written what?
A. Morphine sulphate.
Q. And you remember him distinctly, do you?
A. Yes, sir.
Q. Now, during the month of March, how many patients came to you, and asked you to write prescriptions for morphine sulphate?
A. I can't tell you that.
Q. Well, isn't it a fact that there were considerably more than 300 for whom you wrote such prescriptions in March, 1917?
A. I don't know about that, sir.
Q. Don't you know as a fact that there were 358 prescriptions that you wrote during the month of March, 1917, prescriptions which were filled at this one drugstore?

Objected to by counsel for defense, as not cross examination.

By the Court: A reference to where they were filled wouldn't be important here. The only thing is, it might probably bear on the question of his recollection.

Mr. Humes:

Q. Isn't it a fact that you wrote, during the month of March, 1917, between three and four hundred prescriptions for morphine sulphate?
A. Well, I would have to count them up.
Q. Can you count them up?
241 A. No, I can't.
Q. Don't your books show?
A. Well, it will take a little time.
Q. Well, between now and 1:30?
A. I can do it in that time.

A recess was here taken until 1:30 P. M.

242 Afternoon Session.

Thursday, December 20, 1917.

Dr. E. J. TRADER on the stand.

Cross-examination (resumed).

Mr. Humes:

Q. How many prescriptions did you write in the month of March, 1917, for narcotics?
A. Including the 3rd of March, 560.
Q. How is that?
A. From the 3rd of March, including the 3rd, 560.
Q. Does your record commence with the 3rd of March—is that the reason you start from that date?
A. That is what you wanted, isn't it?

Q. I wanted the month of March, the month of April, and the first three days of May.

A. I have the first two days of May—the first and second.

Q. Have you that record you had this morning?

A. Yes, sir.

Q. Is that a record as taken from this book?

A. Yes, sir.

Q. And you made this summary from this record?

A. Yes, sir.

Q. 560 prescriptions?

A. 560.

Q. Then you had 560 patients who came in for prescriptions just as this man Keith came in?

A. Well, no; a good many of them would come in four or five times in the course of a month, sometimes twice a week, and sometimes every fourth day.

Q. How many individuals do you suppose there were in that 560?

A. I couldn't tell you that, unless I would go over it to see.

Q. How many prescriptions did you write during the month of April?

243 A. 586, up to the 3rd of May.

Q. That includes the 3rd of May?

A. It don't include the 3rd.

Q. Then it is up to the 3rd?

A. Up to the 3rd.

Q. Did you recognize Mr. Keith when he came back again during the month of April?

A. Yes, sir.

Q. You remember him having been there before?

A. Yes, sir.

Q. Did you make a reference to your records to find out what date it was he was there before?

A. Yes, sir, I always do that.

Q. You always do that?

A. Always.

Q. And you then gave him another prescription?

Mr. Marshall: Objected to as not cross examination; the only purpose of this examination is to show that on the 19th of March this man had been there—that is what this was limited to.

The Court: Of course the examination is only relevant as bearing upon the recollection of the witness.

Mr. Humes: I am asking, in order to show what bearing or relation this visit had on the previous occasions, just to test his recollection.

Mr. Humes:

Q. His next time in was the 20th of April, when you recognized him as having been there once before and looked up the date of his former visit?

A. I don't know whether it was the 20th of April or not. The book will show that. Yes, he was in on the 20th of April.

244 Q. And you referred back and found your last prescription to him was the one on the 19th of March, when you say some woman was with him?

A. Yes, sir.

Q. How does it come, if you made an investigation of those records, that you used a different address on the 20th of April from the one you had given him on the 19th of March?

Objected to as immaterial and irrelevant and incompetent to the question at issue.

The Court: He may answer.

A. The patient may have changed his address.

Mr. Humes:

Q. You discovered the change in address?

A. Yes, sir.

Q. And was there any conversation there that attracted your attention especially to Mrs. Keith at that time?

A. Yes, sir.

Q. You then gave her an address in McKeesport?

A. Yes, sir.

Q. Jenny Lind Street, McKeesport.

A. Yes, sir.

Q. Doctor, is it not a fact that in the period of ten months from the first of July, 1916, to the 3rd of May, 1917, you wrote over 4400 prescriptions for narcotics?

Mr. Marshall: Objected to, for the reason that it is incompetent; secondly, it is not cross examination; and thirdly, that it is immaterial whether they were prescriptions for narcotics or not, and they have no right to ask the doctor questions of that kind.

Objection sustained.

Mr. Humes:

245 Q. Doctor, you testified that you wrote 586 prescriptions for narcotics during the month of April and the first two days of May?

A. Yes, sir.

Q. Is it not a fact that you wrote over 700 prescriptions during that period of time?

Objected to, for the reason that it is a matter immaterial to the question at issue, and is not cross examination.

The Court: Unless it is to impeach the record introduced, I hardly think that is proper.

The Witness: Everything is on here that I wrote.

Mr. Marshall: The only question in this case is whether he wrote for Mr. and Mrs. Keith.

The Court: It wouldn't be material, except when his book is introduced as a correct record, and he is relying largely on the book itself. They might ask whether the book fails to show a large number.

Mr Marshall: Will the Court also advise the witness that he is not obliged to answer questions whereby he might incriminate himself.

The Court: The doctor is notified that if any question asked in his judgment would tend to incriminate him, he will not be required to answer—that is, if it would expose him to a criminal prosecution. The witness having introduced, in connection with his testimony, a record upon which he relies, among other things, to show the prescription issued to Keith, and the prescription issued to Keith's wife,

I think this question would be within the fair range of cross
246 examination, if it tends to impeach the validity of that record.

The objection is overruled and an exception noted to defendant.

(Question read.)

A. Everything is in this book here that I wrote. It can be counted up.

Mr. Humes:

Q. You have testified to that book and to what it shows as a summary and have said that your record which has been offered in evidence here, is a correct record, and shows 586 prescriptions during that period. Now, I ask you if it is not a fact that that record is not a correct record, and if it is not a fact that you did write over 700 prescriptions for narcotics during that period of time?

Mr. Marshall: Objected to as not cross examination, first; and second, for the reason that that record was not offered as a correct record of every person who was prescribed for, although it may be. It was offered for one purpose,—to show that Mrs. Keith was prescribed for on the 19th of March, and as showing, in connection with the doctor's testimony, that he remembered her.

The Court: I think for the reason given in the last ruling the question may be answered. An exception is noted to defendant.

(Question read.)

247 A. It is all down in this book, all that I wrote. I might have made a mistake in the counting up, maybe one or two, but it is all down here.

Q. Then you didn't write anything like 700? There wouldn't be that much of a mistake?

A. No chance of it.

Q. What would be the maximum mistake that might have been made? Would you say there could have been a possible mistake of more than one or two or three?

A. There may have been a mistake of my counting. I put every-

thing down in this record, as the patients come in,—the name, the address and date.

Q. Allowing for any possible mistake that you have made in making that addition there, that record would show less than 600 prescriptions, wouldn't it?

A. Yes, sir, less than 600 *hundred*.

Q. And you, with the great number of persons coming to you for narcotic prescriptions, remember distinctly the circumstance of the coming of Mr. Keith and the coming of Mrs. Keith, and you remember their faces?

A. Well, I remember; yes, sir.

Q. Your relations with the defendants here, the Fleming Drug Company, and Mr. Arnold Staley, are very cordial; you are very friendly?

A. We speak.

Q. You are very friendly, aren't you?

A. Not very friendly; just speak, that's all.

Q. You have a great many business relations, don't you?

A. No, sir.

Q. You do not?

A. No, sir.

248 Q. Is it not a fact that you favor their store and are friendly to them, to the extent of favoring their store and sending business to them??

Objected to as utterly improper.

Objection sustained.

248½ *Testimony of E. R. Walter.*

Pages 384 to 388.

249 Dr. E. R. Walter, a witness called on behalf of defendant, having been duly sworn, testified as follows:

Direct examination.

Mr. Marshall:

Q. You are a practicing physician in the city of Pittsburgh?

A. Yes, sir.

Q. And have been for how many years?

A. Since 1894.

Q. Of what school are you a graduate?

A. Hahneman Medical College of Philadelphia.

Q. Doctor, after your graduation from that institution, what did you do?

A. I entered the practice of medicine with my father, the late J. S. Walters, and continued in the general practice of medicine, 1909, when I accepted a position under Mayor Magee, as Director of the Department of Public Health and Director of Charities and Corrections.

Q. Of the City of Pittsburgh?

A. Of the City of Pittsburgh; yes, sir.

Q. How long were you Director of the Department of Public Health and Department of Charities and Correction in the city of Pittsburgh?

A. Four years and nine months.

Q. Since that you have been engaged in general practice?

A. Yes, sir.

Q. Did you ever treat addicts?

A. Yes, sir.

Q. When I say "addicts," I mean to the drug known as morphine.

A. Yes, sir.

Q. What experience have you had, doctor, in treating patients for morphine?

A. You mean, as to the number of cases that I have treated?

Q. Yes.

250 A. Quite a number; I wouldn't want to state—give any definite figure, but quite a number naturally in that many years. It is quite a common habit, and there would be a great many come before you.

Q. I wish you would state whether or not there are or are not many people in the city of Pittsburgh who are holding responsible positions and doing work regularly, that are addicted to the use of morphine?

A. There are many, many of them.

Q. What is the result, if the morphine is not administered to the addict?

A. Well, the symptoms become very grave; there are quite a long line of symptoms. Of course, it results in death in many instances. It depends largely upon the size of the dose that the addict takes, as to the severity of the symptoms and the sufferings and results when the morphine is withdrawn from them.

Q. How much have you known addicts to take, doctor?

A. Enormous doses.

Q. What do you mean by that, how much in twenty-four hours?

A. I had one case myself, a woman, who took as high as 180 grains in twenty-four hours.

Q. That was an extreme case?

A. An extreme case; yes, sir.

Q. I suppose it runs down from that to what?

A. It runs down from that to one grain—from there up.

Q. From one grain a day up?

A. Yes; you see lots taking a dram a day.

Q. That is sixty grains?

A. That is sixty grains; yes, sir.

Q. And do you know, without mentioning names, many men who do take as much as a dram, who are working and have been working for years?

251 A. I have known them, and as far as I know, I suppose they are still addicted to it. I don't know that they have been cured.

Cross-examination

Mr. Henry:

Q. How long did the woman live, taking 180 grains a day, doctor?

A. She had been taking in the neighborhood of that for I guess several years, from what she told me.

Q. You don't know, *of* your own knowledge?

A. I know of a couple of years that she was taking enormous doses.

Q. In what shape did she take it?

A. She would take it by the mouth and hypodermically, both.

Q. You don't know that of your own knowledge, only what she said—of her taking 180 grains a day?

A. I know that positively.

Q. Did she die from it?

A. She died; yes, sir.

Q. What incurable disease did she have, if anything?

A. She had none; she was merely an addict.

Q. How long was that, doctor?

A. That was in 1906, as near as I can recall.

Q. You say one grain a day will make an addict?

A. Oh, yes.

Q. Doctor, do you know of any case reported in any medical book, of an addict taking 180 grains a day?

A. No, sir, I have never read of that.

Q. The only way to treat an addict in order to get a cure is to commit them?

A. That is the only way you can treat it.

Q. You would not write a prescription for an addict for morphine?

A. I certainly would.

Q. You wouldn't put the morphine sulphate in his control and custody?

252 A. Not if I were treating him to effect a cure; no sir. If he had to have the morphine for relief, of course we would give it to him.

Q. You can't treat a man by turning into his hands sixteen drams of morphine sulphate, and giving him entire possession of it, and effect a cure, can you?

A. No, if you are treating him to effect a cure, you wouldn't do that. There is but one way to treat him for a cure, and that is to commit him.

252½ *Testimony of Mrs. Hatitia Moy and Miss Grace E. Moy.*

Pages 140 to 152, Inc.

253 Mrs. Hatitia Moy, called in behalf of defense, sworn.

Mr. Humes: If the Court please, in the light of the knowledge of defendant's counsel, it strikes me that this is rather unprofessional.

Mr. Marshall: "Unprofessional", did you say? As this was ruled

on before, I don't see how I can have it ruled on now, without having the witness called.

Q. You are the wife of Dr. Moy?
A. I am.
Q. Do you live with him?
A. I certainly do.
Q. How long have you been married?
A. Almost twenty-nine years.
Q. And where do you live?
A. I live at 308 Grant Street.

Mr. Humes: If the Court please, it strikes me that this is a matter that the Court ought to take notice of, under the law.

By the Court: I think not, unless there is an objection.

Mr. Humes: Well, we object to the testimony of this witness.

By the Court: You object to the competency of the witness.

Mr. Williams: If the Court please, the Rule of the United States Court, as I apprehend it, is, that in criminal cases the competency of the witness is to be determined by the law as it was at the time of the First Judicial Act of Congress, unless it has been changed by subsequent legislation?

254 By the Court: Yes.

Mr. Williams: I submit that the wife was an incompetent witness at that time. The only question is whether there has been subsequent legislation, and I submit to your Honor, on the authority of Logan vs. the United States, that the Supreme Court of the United States has never passed upon the Act of 1862.

Counsel here quoted from the opinion of Mr. Justice Gray in the above cited case; and also cited other authorities in support of his position.

After discussion by counsel for Government, the following ruling was made.

By the Court: As I understand the rule of evidence, whether the witness is competent or incompetent in the United States depends upon her competency or incompetency at the time the Judicial Act was first passed. As at that time the wife was an incompetent witness for the husband, she remains incompetent, unless enabled to testify by a subsequent Act of Congress. The Act of 1862, as I understand it, refers to Acts of Common law, in equity and in admiralty, and does not apply to criminal cases. The objection is therefore sustained, and an exception noted to defendants.

255 Mr. Marshall, of counsel for defense, made the following offer at side bar, not in the hearing of the jury:

The defendant offers the wife of Dr. Moy, now on the stand, intending and offering to prove by her, in contradiction of the testimony of one Frew, alias Henry, wherein *he* testified that he did not take a woman to the office of Dr. Moy; by showing by the testimony of the witness, the wife of Dr. Moy, one of the defendants,

that she was present at the office of Dr. Moy when Henry came there on two different occasions with a woman. Also, for the purpose of contradicting Mr. Oyler, a witness produced on the part of the Government, as to what took place at the time of his visits to Dr. Moy.

Counsel for Government object to the competency of the witness.

By the Court: As I understand the witness to be incompetent to testify to anything in favor of her husband in this criminal proceeding, the objection is sustained and an exception noted for defendants.

256 GRACE ELEANOR MOY, a witness called on behalf of defense, sworn, testified as follows:

Direct examination.

By Mr. Marshall:

Q. Your name is Grace Eleanor Moy?
A. Yes, sir.
Q. What relation, if any, are you to Dr. Moy??
A. I am his niece.
Q. Did you come to visit Dr. Moy at any time in the spring of 1917?
A. Yes, sir.
Q. First, I forgot to ask you—Where do you live?
A. Chicago, Illinois.
Q. You live there with your parents?
A. Yes, sir.
Q. And you came to visit your uncle, you say,—when?
A. March 30, 1917.
Q. And how long did you remain?
A. Until May 7, 1917.
Q. During the time that you were visiting your uncle, did you see Mr. Oyler at your uncle's office?
A. Yes, sir.
Q. Your uncle's offices are where?
A. 308 Grant Street.
Q. In the first or second floor?
A. Second floor.
Q. And how many offices has he?
A. He has one office and a reception room.
Q. You are distinguishing between the office and the reception room?
A. There is just one private office.
Q. And a reception room in front?
A. Yes, sir.

257 Q. The reception room, I believe, fronts on Grant Street?
A. Yes, sir.
Q. And if you go up Fourth Avenue here to Grant Street and turn

down Grant towards Third Street, your uncle's office is on the left side of the street?

A. Yes, sir.

Q. I believe you did say that you knew Mr. Oyler to see him?

A. Yes, sir.

Q. When did you first see him at your uncle's office, if you remember?

A. Well, it was in April, some time; I can't just remember the date.

Q. Do you recognize the man?

A. Yes, sir.

Q. And on how many different occasions did you see him there?

A. Three times.

Q. Where were you on the first two visits?

A. In my uncle's office; that is, his private office.

Q. And when Mr. Oyler came in, did you remain in the office or did you leave the office?

A. I remained in the office.

Q. Calling your attention to the first visit, did you hear what was said and see what was done?

A. Yes, sir.

Q. Will you tell the Jury what was said and what was done?

A. When Mr. Oyler came to the office, he asked if he could have a prescription, and my uncle asked him where he lived; he wanted his name, and he wrote his name down.

Q. Do you remember what name he wrote?

A. Lyon. I remember that particularly well. He gave the name of Lyon, and my uncle asked him if he lived in the city and he said no, he was a travelling man.

238 Q. Who said he was a travelling man?

A. Mr. Oyler said he was a travelling man. And my uncle asked him how much he wanted and he told him. I can't remember exactly how much morphine he wanted. And my uncle asked him why he wanted it. He said it was from a surgical operation, or a surgical pain, rather, and that he had to have it. My uncle took Mr. Oyler to the window, in a bright light, and looked at his eyes. And he tested his lungs; that is, he tapped on his lungs. And then he wrote out the prescription for him.

Q. On the second occasion when Mr. Oyler came to your uncle's office, were you in your uncle's office?

A. Yes, sir.

Q. What took place on that occasion?

A. Well, I can't remember exactly, but he asked for a prescription, and my uncle filled it for him. I wasn't listening to what they were saying or seeing what they were doing, because I was reading at the time.

Q. That is, on the second visit?

A. On the second occasion, yes.

Q. You say you didn't pay attention to what they were saying. Did Mr. Oyler in that second conversation say, "I had to sell a bottle

of the stuff that I got from you on Wednesday, as things are looking awful tough for me"?

A. No, sir.

Mr. Hunter: I think the witness said that she was reading and didn't hear what was said.

Mr. Marshall: No; that she didn't pay attention to what was said.

By the Court: That would be subject to cross examination, as she didn't exclude herself entirely.

259 Mr. Marshall:

Q. Would such a remark as that have attracted your attention?

A. It certainly would have.

Q. On the third occasion that he came to your uncle's office, where were you?

A. I was in the reception room that time.

Q. And didn't hear what was said?

A. No, sir.

Q. Have you visited your uncle more than once during the last two years?

A. No.

Q. Just that once?

A. Just that once.

Q. Well, during the time that you were present at his house, from the third of March until the seventh of May, did you see many patients come to your uncle's office?

A. Quite a few.

Q. Did he or not examine those patients?

A. Yes, sir.

Cross-examination.

By Mr. Hunter:

Q. Miss Moy, when were you first asked and when did you first tell anybody what took place at your uncle's office on these occasions?

A. At the last trial, for the first time.

Q. You had never mentioned it and never been asked about it by anyone until you testified in court?

A. Well, when I arrived in Chicago, this last time here, Mr. Marshall asked me if I knew of a Mr. Oyler, and I said I couldn't recollect the name at the time——

Q. Let me understand you. Did you say when you arrived in Chicago or from Chicago?

A. From Chicago.

260 Q. Well, when was that?

A. I have it here in a book.

Q. At the time of the former trial, do you mean?

A. Yes, sir.

Q. When you arrived, at the time of the former trial?

A. Yes, sir.

Q. Go ahead.

A. He asked me if I knew a Mr. Oyler, and I said I couldn't recollect the name at the time, and when I came up to the court room, as soon as I saw Mr. Oyler, I pointed him out to him.

Q. That was about the 12th of November?

A. About.

Q. You had never mentioned this matter to anyone until you talked it over with Mr. Marshall?

A. I didn't talk it over with Mr. Marshall.

Q. Well, I mean, you had never discussed the matter with anyone until you and Mr. Marshall discussed it?

A. No, sir.

Q. Then the first time that your attention was ever called to this matter was seven months after it occurred?

A. Just about that time.

Q. Were you subpoenaed to come here from Chicago at that time?

A. My uncle wired me.

Q. Oh, he wired you to come?

A. Yes, sir.

Q. Did you know what you were coming for when he wired you?

A. No, sir.

Q. You didn't know what you were coming for at all?

A. No, sir.

Q. How many patients do you suppose you saw in your uncle's office while you were here?

A. I couldn't tell you that; there were quite a few that I saw.

Q. Well, there were from twenty-five to fifty a day, weren't there?

A. Yes, twenty-five, but I can't say as many as fifty.

261 Q. You saw Mr. Truxton on the witness stand, didn't you?

A. Yes, sir.

Q. Did you ever see him [illegible] here?

A. Yes, sir.

Q. And you saw Mr. Frew on the witness stand?

A. Yes, sir.

Q. Did you ever see him up there?

A. I can't remember of seeing him.

Q. Do you remember of seeing any of the other witnesses who have been on the witness stand and who have testified to being there during the time from March 30 to May 7—do you remember of seeing any of them at all?

A. Except Mr. Oyler.

Q. Mr. Oyler was the one man of them all that you remember of seeing there?

A. Yes, sir.

Q. How was Mr. Oyler dressed the first time that he came in?

A. I can't remember that.

Q. Well, did he have an overcoat on, or didn't he?

A. I think he did. It was cold enough.

Q. Well, do you think he had an overcoat on, because it was cold that day?

A. Yes, sir.
Q. And that's the reason you think he had an overcoat on?
A. Yes.
Q. Now, was it at the first visit that you were reading?
A. Yes, sir.
Q. And what were you doing on the second visit?
A. I was reading.
Q. You were reading then, too?
A. Yes, sir.

Q. And were you reading at the third visit?

262 A. No, I was just sitting in the reception room.

Q. Were you in the same room with Mr. Oyler and your uncle at the third time?
A. No, I was in the reception room, I said.
Q. Did you hear the conversation that time?
A. No, sir.
Q. Oh, you don't know anything anyone said or did at that time?
A. No, sir.

Mr. Marshall:

Q. How do you remember Mr. Oyler? Is there any way that you remember him?
A. Why, when he gave the name of Lyon, my uncle said in a joking way to my aunt that he must be a relative of hers, because my aunt has a relative by the name of Lyon.
Q. Is there any other way that you remember?
A. No, sir.

262½ *Motion to Strike from Record Testimony of Druggists and Physicians.*

Pages of Testimony 288 to 290, Inc.

263 And now, Thursday, December 20, 1917, hearing resumed at ten o'clock P. M.

Mr. Williams, of counsel for defense in this case, moved the Court to strike from the record all of the testimony of the druggists and physicians who have been examined touching and concerning the quantity or amount of the drug prescribed by Dr. Moy, or the proper amount of the drug prescribed by a physician that a druggist would or should fill, or that a physician should prescribe, or of charges or fees of a physician for the writing of prescriptions and examination, or the charges of the druggists for the drug, as wholly impertinent to the issue in this case, and incompetent and irrelevant; there being nothing in the Harrison Anti-Narcotic Act limiting the amount or quantity of the drug that a physician may prescribe.—(U. S. vs. Friedman, 224 Federal Reporter, 276).

If the Court should be of the opinion that the provisions of said Harrison Act, or regulations passed pursuant thereto, does or do,

limit the amount or quantity of the drug to be prescribed by a physician, then it is respectfully urged that any such provision is ultra vires and void; no power having been delegated to the Congress of the United States to pass legislation of this character, such legislation would be an exercise of the police power reserved, under the Federal Constitution, to the several States and the people thereof. That, under the Federal Constitution, the police power of Congress, in Revenue Laws, is limited to the protection and collection of the taxes imposed; that Congress has nothing whatever to do with the moralities of the article or traffic taxed.

That this is true is shown by an analogy in liquor cases, in the taxing power of Congress over whiskey, under its police power, they have passed many statutes and regulations imposing
264 penalties and punishments for the non-payment of taxes imposed upon those liable to the tax, and for violation of the acts and regulations relating to the collection of taxes. For example, that proper stamps be affixed, the cancellation of stamps, defacing the same, exhibiting or posting the receipts showing tax paid by a wholesale or retail liquor dealer, and so on; but not a law or regulation against the evils of the sale or giving away of the liquor. A Dealer can sell to persons of known intemperate habits, to minors, on Sunday, etc. These evils are left to the police power of the State to be dealt with. And it has never been contended that the Government, by Congress, had police powers in such cases.

And for this reason we submit that the Harrison Act is unconstitutional.

(U. S. vs. De Witt, 9 Wallace, 41.)

By the Court: It being clear, under the provisions of the Harrison Anti-Narcotic Act, that none of the drugs in question may be imported, manufactured, sold, dealt in, distributed, or even given away, except for medicinal purposes, the motion to strike out is overruled.

Exception noted to defense.

Government rests.

264½ *Prescriptions of Dr. Moy Set Forth in Counts 2, 3, 4, 5, 6, 7, 10 and 11 of Indictment.*

265 Prescription set forth in second count of indictment:

"Jin Fuey Moy, M. D.,
308 Grant Street,
Pittsburgh, Pa.

March 25, 1917.

Henry McKnight, 48 Sibley Street, Detroit, Mich.

Morphine Sulphate 5xii

Sig: Use as directed.
H19519.
3-25-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

Prescription set forth in third count of indictment:

"Jin Fuey Moy, M. D.,
308 Grant Street,
Pittsburgh, Pa.

April 28, 1917.

Henry McKnight, 48 Sibley St., Detroit, Mich.

Morphine Sulphate 5x

Sig: Use as directed.
H20684.
4-28-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

Prescription set forth in fourth count of indictment:

"Jin Fuey Moy, M. D.,
308 Grant Street,
Pittsburgh, Pa.

March 30, 1917.

Harry Lyman, 3242 Cedar Avenue, Cleveland, Ohio.

Morphine Sulphate 5xii

Sig: Use as directed.
H19663.
3-30-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

266 Prescription set forth in fifth count of indictment:

"Jin Fuey Moy, M. D.,
308 Grant Street,
Pittsburgh, Pa.

April 6, 1917.

Harry Lyman, 3242 Cedar Ave., Cleveland, Ohio.

Morphine Sulphate 5xvi

Sig: Use as directed.
H19904.
4-6-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

Prescription set forth in sixth count of indictment:

"Jin Fuey Moy,
308 Grant Street,
Pittsburgh, Pa.

April 16, 1917.

Harry Lyman, 3242 Cedar Ave., Cleveland, Ohio.

Morphine Sulphate 3ss

Sig: Use as directed.
H20225.
4-16-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

Prescription set forth in seventh count of indictment:

"Jin Fuey Moy, M. D.,
308 Grant Street,
Pittsburgh, Pa.

May 8, 1917.

Harry Lyman, 3242 Cedar Ave., Cleveland, Ohio.

Morphine Sulphate 3ss

Sig: Use as directed.
H21073.
5-8-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

267 Prescription set forth in tenth count in indictment:

"Jin Fuey Moy, M. D.,
308 Grant Street,
Pittsburgh, Pa.

April 6, 1917.

John Henry, 1562 Curtis Avenue, Cleveland, Ohio.

Morphine Sulphate 5xvi

Sig: Use as directed.
H19903.
4-6-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

Prescription set forth in eleventh count of indictment:

"Jin Fuey Moy, M. D.,
308 Grant Street,
Pittsburgh, Pa.

April 27, 1917.

John Henry, 1732 Curtis Avenue, Cleveland, Ohio.

Morphine Sulphate 5xii

Sig: Use as directed.
H20654.
4-27-17.

JIN FUEY MOY.

U. S. Registry No. 4445, 23rd District of Penna."

268 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1917.

No. 89, Criminal Docket.

UNITED STATES

vs.

JIN FUEY MOY.

Motion in Arrest of Judgment.

And now, to wit, December 28, 1917, comes John W. Dunkle, Esq., and N. S. Williams, Esq., attorneys for Jin Fuey Moy, the defendant in the above entitled case, and moves the Court that judgment be arrested and in support thereof assign the following reasons:

First. The so-called "Harrison Anti-Narcotic Act" is unconstitutional and void.

Second. The so-called "Harrison Anti-Narcotic Act" is unconstitutional and void, so far as it does or attempts to control and regulate the practice of a physician.

Third. The indictment, as a whole, does not charge the defendant with the commission of any offense prohibited by the so-called "Harrison Anti-Narcotic Act" or with the commission of an offense prohibited by any other law of the United States.

Fourth. There was no competent evidence submitted on the part of the United States to sustain the verdict rendered by the jury.

(Signed) JOHN W. DUNKLE,
(Signed) N. S. WILLIAMS,
Attorneys for the Defendant.

Filed December 28, 1917. J. Wood Clark, Clerk.

268½ And now, December 28th, 1917, the within motion is presented in open Court and ordered to be filed.

Per CURIAM.

269 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1917.

No. 89.

THE UNITED STATES

vs.

JIN FUEY MOY.

Opinion.

Filed Jan. 19, 1918.

THOMSON, *J.*:

The defendant was indicted under Section 2 of the Harrison Anti-Narcotic Act, wherein it is charged that he did unlawfully sell, barter, exchange and give away certain drams of morphine sulphate to different persons therein named. The indictment contains twenty counts, in form the same, differing only in the names of the persons to whom the drugs were distributed and the amount dispensed. A motion to quash the indictment was made, alleging the unconstitutionality of the Harrison Act, and that the indictment as drawn does not charge the defendant with the commission of any offense prohibited by the Act. The motion to quash was overruled, the defendant tried and convicted on eight counts. The case is now before the Court on a motion in arrest of judgment. The reasons assigned in support of this motion are:

First. The so-called Harrison Anti-Narcotic Act is unconstitutional and void.

Second. The so-called Harrison Anti-Narcotic Act is unconstitutional and void, so far as it does or attempts to control and regulate the practice of a physician.

270 Third. The indictment as a whole, does not charge the defendant with the commission of any offense prohibited by the so-called Harrison Anti-Narcotic Act, or with the commission of an offense prohibited by any other law of the United States.

Fourth. There was no competent evidence submitted upon the part of the United States, to sustain the verdict rendered by the jury.

First as to the constitutionality of the Harrison Act. It seems to me that this Act should be read in the light of the previous legislation of Congress in restraint of the traffic in opium. The Act approved February 9th, 1909, provides:

"That after the first day of April, 1909, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: provided, that opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized

to prescribe, and when so imported shall be subject to the duties which are or may hereafter be imposed by law."

The second section provides a maximum punishment of two years imprisonment and five thousand dollars fine, of any person who shall fraudulently or knowingly import or assist in doing so, any opium or derivative thereof contrary to law, or who shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such drug after importation, knowing the same to have been imported contrary to law. It further provides that the drug shall be forfeited and destroyed, and that possession of such drug shall be deemed sufficient evidence, if unexplained, to authorize conviction of the person in possession thereof.

It is plain that Congress had the power to prohibit altogether the importation from foreign shores of this deadly narcotic, or they had the right to admit it under such restrictions as to its use, in protection of the public, as they might see fit to impose. And having done so, they may prescribe such regulations, penal or otherwise, as will effect the purpose intended, that is, to restrict its use to that for which alone it was admitted.

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Every provision of the Harrison Act which deals with the use of the drugs in question, shows that its use is restricted and intended to be confined to medicinal purposes only. This is in harmony with the law prohibiting its importation or use for any other purpose.

It is a matter of common knowledge that no opium is produced in the United States; but this can perhaps not be assumed, when the Act undertakes to deal with those who produce it. In the case of the United States vs. Jin Fuey Moy, 241 U. S. 394, the Supreme Court said:

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."

In the same opinion, the Court said:

"It may be assumed that the statute (the Harrison Act) has a moral end as well as revenue in view, but we are of opinion that the District Court in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right."

I am not convinced that the Congress in enacting the Harrison law exceeded its constitutional powers, and the motion in arrest of judgment on this ground cannot be sustained.

Again, it is urged that the indictment as a whole does not charge the defendant with the commission of any offense prohibited by the Harrison Act. All the counts of the indictment, which are the same in form, are drawn under the second section of the Act and charge that the defendant was a practising physician, and did unlawfully, wilfully, etc., sell, barter, exchange and give away certain drams of morphine sulphate to the person therein named, not in pursuance of a written order from such person on a

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form issued in blank for that purpose by the Commissioner of Internal Revenue. There is no possible question that the indictment thus far distinctly charges an offense under Section 2, but the pleader instead of stopping here, undertook to negative the exception to that section in relation to the distribution of drugs by a physician. It was not necessary for the pleader to do so, as the exception is entirely separated from the words of the section defining the offense. The rule of pleading in such case is clearly set forth in United States vs. Cook, 178 Wall. 168. The first exception to Section 2 is in these words:

"Nothing contained in this section shall apply (*a*) to the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist or veterinary surgeon, registered under this Act, in the course of his professional practice only,"

with certain requirements as to the keeping of records. As it was not necessary in this case for the pleader to negative the exception, the only question is, is there anything in the subsequent words of the indictment that destroy the legal effect of the previous words, wherein the charge is specifically and legally Made? After charging the offense as above quoted, the indictment proceeds:

"That is to say, that at the time and place aforesaid, he the said Jin Fuey May, did unlawfully and wilfully, knowingly and feloniously, sell, barter, exchange, give away, dispense and distribute to the party named, twelve drams of morphine sulphate in manner following, to-wit, that said Jin Fuey Moy at the time and place aforesaid, did issue and dispense to the said party a certain prescription, a copy of which is as follows: (then follows a copy of the prescription signed by the defendant, wherein the morphine sulphate is prescribed to be used as directed), and the said party, (naming him) was not then and there a patient of the said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only, contrary to the form of the Act," etc.

273 The offense under Section 2 is to sell, barter, exchange or give away any of the prescribed drugs, except in pursuance of an order on the designated order form. The registered physician may successfully defend on the ground that he did not dispense or distribute the drug in question except to a patient in the course of his professional practice only. But this is a defense which must be set up by the physician, in order to escape the general requirements prescribed in Section 2. The words in which exception (*a*) is negatived in the indictment, must be read in the light of the words in which the offense is charged under the general provisions of Section 2. It is alleged under the videlicet that the defendant "did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away," with the additional words "dispense and distribute" to the party the drug in question. This is followed by giving the manner of the disposition of the drug, by the issuing of the prescription therein set forth. To this there can be but one meaning, that is, that the drugs were disposed of by means of the

prescriptions. Then following the words which take the physician out of the exception, namely, that the party was not a patient of the physician and the drug was dispensed and distributed by the physician not in the course of his professional practice only. It cannot be complained that the words "dispensed and distributed" are not used in the enacting clause of Section 2. In order to escape the effect of the words "sell, barter, exchange or give away" used in the enacting clause of Section 2, the physician must show that the drugs so disposed of were dispensed or distributed by him to a patient in the course of his professional practice.

I held before, and still hold, that the indictment sufficiently charges a violation of Section 2 of the Harrison Act.

274 It is insisted that to dispense or distribute the drugs on a prescription is not to sell, barter, exchange or give them away.

It is held in United States vs. Stowell, 133 U. S. 1, that statutes enacted to prevent frauds upon the revenue, are considered as enacted for the public good and to suppress a public wrong, and therefore, although they may impose penalties or forfeitures, are to be fairly and reasonably construed so as to carry out the intention of the Legislature. It could hardly be said that words of so broad import as "sell, barter, exchange or give away," when standing together, were intended by Congress to be so narrowly and strictly construed as to include only those cases where title to the proscribed drug was in him who undertook to dispense or distribute it. The lawmakers were not concerned with the ownership of the drug but with its lawful distribution. It could matter nothing to the poor victim in the fatal clutches of the drug habit, where title was to the narcotic which was thus dispensed to him, every grain of which brought him nearer to the grave. Whether the victim procured the drug from the hand of the physician, or through the druggist on an order or prescription of the physician, can matter nothing, unless we look blindly at the letter of the Act, wholly forgetting its spirit and purpose.

In the last place, it is claimed that there was no competent evidence submitted on the part of the Government to sustain the verdict of the jury. On the contrary, there was a super-abundance of such evidence. Unless this section of the Act is a dead letter, it would be hard to conceive a more flagrant case of its violation. The defendant seems to have obtained an extended and unenviable

275 reputation as a dispenser of morphine sulphate. From Brooklyn to Chicago, from all the Lake cities, the victims of the drug habit came to Dr. Moy and procured the drugs. When we remember that the testimony showed that morphine sulphate is at least eight times as powerful and deadly as opium; that one-half grain is a large dose and a grain a fatal dose to the non-user; that there are sixty grains in one dram, and that the defendant time and again issued prescriptions for as much as sixteen drams to one person, or 960 grains, enough to kill an entire regiment; that he issued in the two years preceding the indictment, 11,687 prescriptions calling for 15,796 drams, and in addition 43,200 one-half grain morphine tablets and 30,600 one-quarter grain tablets, we can have some conception of the magnitude of the defendant's unlawful bus-

ness in the distribution of narcotics. And when we consider that for every drum prescribed, he received one dollar, the commercial feature of the unlawful business becomes painfully and alarmingly apparent.

The motion in arrest of judgment is overruled.

To which action of the Court defendant excepts, and on his motion exception allowed and bill sealed.

W. H. S. THOMSON, *Judge.*

276 *Verdict.*

Jin Fuey Moy.
#89 Nov. Term, 1917.
Guilty under counts #2, 3, 4, 5, 6, 7, 10, and 11.
Not guilty under counts #1, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, and 20.

Jas. Fleming & Sons Co.
Arnold A. Staley.
Jno. Staley.
No. 90 Nov. Term, 1917.
Guilty count #1.
Not Guilty counts 2 to 15 inclusive.
Jno. C. Larkin not guilty under any counts.

Jin Fuey Moy and Jas. Fleming & Sons Co., Arnold Staley, Jno. Staley, and Jno C. Larkin.
#23 May Term, 1917.
Not guilty on any counts.

We recommend the leniency of the Court to said Defendants.

JOHN C. BROWN, *Foreman.*
E. J. COX, *Secy.*

[Endorsed:] Nos. 23 May T., 1917.
89 Nov. " "
90 " " "
United States District Court. United States vs. Jin Fuey Moy, et al. Verdict. Filed Dec. 24th, 1917. J. Wood Clark, Clerk.

277 *Sentence of the Court.*

3-15-509.

In the District Court of the United States for the Western District of Pennsylvania, Nov. Term, 1917.

No. 89, Criminal Docket.

THE UNITED STATES

vs.

JIN FUEY MOY.

And now, to wit, February 6th, A. D. 1918, the Sentence of the Court is, that you pay a Fine to the United States of One thousand Dollars; that you be Imprisoned in the Federal Prison at Atlanta, Georgia for and during the term of Two Years and be subject to the same discipline and treatment as convicts sentenced by the Courts of the State; and while so confined therein you shall be exclusively under the control of the officers having charge of the said Federal Prison; that you pay the Costs of this prosecution, and stand committed until this sentence be complied with.

PER CURIAM.

Filed Feb. 6th, 1918. J. W. Wood Clark, Clerk.

[Endorsed:] No. 89. Nov. Term, 1917. (Criminal Docket.) United States District Court, Western District of Pennsylvania. The United States, vs. Jin Fuey Moy. Sentence of the Court. Filed Feb. 6th, 1918. J. Wood Clark, Clerk.

278 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1917.

No. 89.

THE UNITED STATES

vs.

JIN FUEY MOY.

Assignment of Errors.

Filed February 6, 1918.

And now, to-wit, January —, 1918, comes the defendant, Jin Fuey Moy, and in connection with his petition for writ of error herein makes the following assignment of errors which he states occurred upon the trial.

First. The Court erred in refusing to grant defendant's motion to quash the indictment, which motion was made before plea and before the jury was sworn in the case.

Second. The learned Court who tried this case, erred in answer given to the defendant's second point submitted at the close of the trial, which point and answer are as follows:

"Second. Under the law and the evidence the verdict must be not guilty in the case at No. 89 November Term, 1917."

Answer. The first, second, tenth and thirteenth points have been refused, and I will not read them.

Third. The learned Court erred in the answer to the eleventh point, which point and answer are as follows:

"Eleventh. The Act of Congress under which the indictments are drawn does not limit the amount of morphine sulphate which a physician may prescribe to his patient neither does said act limit the amount of money the physician may charge his patient for writing the prescription."

Answer. The Act of Congress does not undertake to limit the morphine sulphate which a physician may prescribe
279 for his patient, nor the amount of his charge therefor, but, if the physician seeks protection under Exception (*a*) as against the requirements of Section 2, it must appear that drugs were dispensed by him to a patient in the course of his professional practice only. And the amount of drugs so Prescribed, and the charge therefor, may throw light on the question whether the drugs were in fact administered by the physician in good faith in the course of his professional practice only.

Fourth. The learned Court erred in the answer to the twelfth point, which point and answer are as follows:

"Twelfth. Before there can be a conviction of Jin Fuey Moy on the indictment at No. 89 November Term, 1917, the jury must find from the evidence, beyond a reasonable doubt, that said defendant, Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously, sell, barter, exchange or give away some of the morphine sulphate to one or more of the persons named in said indictment."

Answer. While the indictment charged the sales and dispensing of the drugs were feloniously made, if the jury are satisfied beyond a reasonable doubt that they were wilfully and knowingly so bartered, exchanged or given away by the defendants, in violation of Section 2, as charged in the indictment, the defendants would be guilty.

Fifth. The learned Court erred in the answer to the thirteenth point, which point and answer are as follows:

"Thirteenth. If the jury find from the evidence that each of the prescriptions mentioned in the indictment at No. 89 November Term, 1917, were written by Dr. Jin Fuey Moy, in his office, on the several dates mentioned in said indictment, that the person for whom each prescription was written came to his office and stated that he was addicted to the use of the drug, giving the amount used,
etc., and if before writing the prescription the Doctor ex-
280 amined each patient after which he wrote the prescription with instructions as to how to use it, and believing that it

would be used by the patient, then the offense charged in the indictment was not committed and the verdict must be not guilty."

Answer. The first, seven-, tenth and thirteenth points have been refused, and I will not read them.

Sixth. The learned Court erred in using the following language in the general charge which he delivered to the jury, to-wit:

"Now, I say to you, as a matter of law that a physician, under this Act, cannot dispense any of these narcotic drugs except to a patient; that is, to one who is the subject of medical or surgical treatment; the drugs being dispensed to such patient by the physician for medicinal purposes, in alleviating suffering or endeavoring to effect a cure. And a physician who prescribes such narcotic drugs to one not a patient violates the law. Or, if he dispenses or distributes such drugs in any way except in the course of his professional practice only, he is guilty of a violation of the Act in question."

Seventh. The learned Court erred in using the following language in the general charge which he delivered to the jury, to-wit:

"You are to determine, gentlemen, from all the facts and circumstances, from the testimony of the Government and from that offered on the part of the defense, whether Dr. Moy dispensed narcotic drugs only to patients in the course of his professional practice, or whether he made a business of dispensing the drugs to the public generally as they were called for, merely seeking shelter behind the prescription which he issued. You have a right to consider the number of persons to whom he prescribed; whether they were known to him or were strangers; the character of the examinations,
281 if any, which he made before prescribing; the number of prescriptions issued and the amounts prescribed to an individual at one time; whether he was endeavoring in good faith to treat them for the purpose of alleviating suffering or effecting a cure; or was making merchandise of narcotic drugs, feeding the depraved appetite of addicts without reference to their mental and physical welfare, or any ultimate cure to be effected."

Eighth. The learned Court erred in using the following language in the general charge which he delivered to the jury, to-wit:

"If you find that he was prescribing narcotic drugs not in good faith and with an honest purpose to comply with the law, but was dispensed to the public generally as they were applied for, not in the course of his professional practice only, then he would be guilty under this indictment. He would not be entitled to the benefit of the exception under which he defends, because of his violation of its conditions, and would therefore be liable for a violation of Section 2, under which the indictment is drawn, of selling or dispensing such drugs without a written order from the purchaser, on order forms designated by the Act."

Ninth. The learned Court erred in refusing defendant's motion to strike from the record certain testimony, which motion and the rulings thereon are as follows:

"Mr. Williams, of counsel for defense in this case, moved the Court to strike from the record all of the testimony of the druggists and physicians who have been examined touching and concerning

the quantity or amount of the drug prescribed by Dr. Moy, or the proper amount of the drug prescribed by a physician that a druggist would or should fill, or that a physician should prescribe or of charges of fees of a physician for the writing of prescriptions and examination, or the charges of the druggist for the drug, as
282 wholly impertinent to the issue in this case, and incompetent and irrelevant; there being nothing in the Harrison Anti-Narcotic Act limiting the amount or quantity of the drug that a physician may prescribe. (U. S. vs. Friedman, 224 Federal Reporter, 276).

If the Court should be of the opinion that the provisions of said Harrison Act, or regulations passed pursuant thereto, does or do, limit the amount or quantity of the drug to be prescribed by a physician, then it is respectfully urged that any such provision is ultra vires and void; no power having been delegated to the Congress of the United States to pass legislation of this character, such legislation would be an exercise of the police power reserved, under the Federal Constitution, to the several States and the people thereof. That, under the Federal Constitution, the police power of Congress, in Revenue Laws, is limited to the protection and collection of the taxes imposed; that Congress has nothing whatever to do with the moralities of the article or traffic taxed. That this is true is shown by an analogy in liquor cases, in the taxing power of Congress over whiskey, under its police power, they have passed many statutes and regulations imposing penalties and punishments for the non-payment of taxes imposed upon those liable to the tax, and for violation of the acts and regulations relating to the collection of taxes. For example, that proper stamps be affixed, the cancellation of stamps, defacing the same, exhibiting or posting the receipts showing tax paid by a wholesale or retail liquor dealer, and so on; but not a law or regulation against the evils of the sale or giving away of the liquor. A dealer can sell to persons of known intemperate habits, to minors, on Sunday, etc. These evils are left to the police power of the State to be dealt with. And it has never been contended that the Govern-
283 ment, by Congress, had police powers in such cases.

And for this reason we submit that the Harrison Act is unconstitutional.

(U. S. vs. DeWitt, 9 Wallace, 41.)

By the Court: It being Clear, under the provisions of the Harrison Anti-Narcotic Act, that none of the drugs in question may be imported, manufactured, sold, dealt in, distributed, or even given away, except for medicinal purposes, the motion to strike out is overruled.

Exception noted to defense."

Tenth. The learned Court erred in refusing to allow Mrs. Hatitia Moy, wife of the defendant, to testify, which refusal appears in the following extract from the record:

"Mrs. HATTIE MOY, called in behalf of defense, sworn.

Mr. Humes: If the Court please, in the light of the knowledge of defendants' counsel, it strikes me that this is rather unprofessional.

Mr. Marshall: "Unprofessional," did you say? As this was ruled on before, I don't see how I can have it ruled on now, without having the witness called.

Q. You are the wife of Dr. Moy?
A. I am.
Q. Do you live with him?
A. I certainly do.
Q. How long have you been married?
A. Almost twenty-nine years.
Q. And where do you live?
A. I live at 208 Grant Street.

Mr. Humes: If the Court please, it strikes me that this is a matter that the Court ought to take notice of, under the law.

By the Court: I think not, unless there is an objection.

284 Mr. Humes: Well, we object to the testimony of this witness.

By the Court: You object to the competency of the witness.

Mr. Williams. If the Court please, the Rule of the United States Court, as I apprehend it, is that in criminal cases the competency of the Witness is to be determined by the law as it was at the time of the First Judicial Act of Congress, unless it has been changed by subsequent legislation?

By the Court: Yes.

Mr. Williams: I submit that the wife was an incompetent witness at that time. The only question is whether there has been subsequent legislation, and I submit to you- Honor, on the authority of Logan vs. The United States, that the Supreme Court of the United States has never passed upon the Act of 1862.

Counsel here quoted from the opinion of Mr. Justice Gray in the above cited case; and also cited other authorities in support of his position.

After discussion by counsel for Government, the following ruling was made.

By the Court: As I understand the rule of evidence, whether the witness is competent or incompetent in the United States Court depends upon her competency or incompetency at the time the Judicial Act was first passed. As at that time the wife was an incompetent witness for the hubsand, she remains incompetent, unless enabled to testify by a subsequent Act of Congress. The Act of 1862, as I understand it, refers to Acts of common law, in equity and in admiralty, and does not apply to criminal cases. The objection

285 is therefore sustained, and an exception noted to defendants.

Mr. Marshall, of counsel for defense, made the following offer at side bar, not in the hearing of the jury:

The defendant offers the wife of Dr. Moy, now on the stand, in-

tending and offering to prove by her, in contradiction of the testimony of one Frew, alias Henry, wherein he testified that he did not take a woman to the office of Dr. Moy; by showing by the testimony of the witness, the wife of Dr. Moy, one of the defendants, that she was present at the office of Dr. Moy when Henry came there on two different occasions with a woman. Also for the purpose of contradicting Mr. Oyler, a witness produced on the part of the Government, as to what took place at the time of his visits to Dr. Moy.

Counsel for Government object to the competency of the witness.

By the Court: As I understand the witness to be incompetent to testify to anything in favor of her husband in this criminal proceeding, the objection is sustained and an exception noted for defendants."

Eleventh. The learned Court erred in each and every particular of its general charge to the jury in this; to-wit, That the Court should have withdrawn the issues from the jury and directed a verdict for the defendant.

Twelfth. The learned Court erred in refusing to grant defendant's motion in arrest of judgment.

Thirteenth. The learned Court erred in overruling motion made by defendant in arrest of judgment.

Fourteenth. The learned Court erred in pronouncing judgment after motion made in arrest of judgment.

(Signed) N. S. WILLIAMS,
(Signed) JOHN W. DUNKLE,
Attorneys for Defendant.

286 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1917.

No. 89, Criminal Docket.

UNITED STATES

v.

JIN FUEY MOY

To the Honorable W. H. Seward Thomson, Judge of the United States District Court for the Western District of Pennsylvania:

Jin Fuey Moy, the defendant above named, considering himself aggrieved by the rulings, decision and judgment of the Court in the above entitled case, hereby makes application for a writ of error to the Supreme Court of the United States in order that the said Supreme Court may review the action of your Honorable Court and prays that a writ of error may be allowed and that the transcript of the record, proceedings, and papers in said case duly authen-

ficated, may be sent to the Supreme Court as the law in such cases provides.

And he will ever pray, Etc.

(Signed) JIN FUEY MOY,
Defendant.

WESTERN DISTRICT OF PENNSYLVANIA,
City of Pittsburgh, ss:

Before me the undersigned authority, in person came Jin Fuey Moy, the petitioner above named, who, being by me duly sworn according to law doth depose and say that the facts set forth
287 in the foregoing petition are true and correct to the best of his knowledge and belief, and affiant further saith that said petition or application is not made out — levity or for the purpose of delay, but that affiant, the said petitioner, verily considers himself aggrieved as therein set forth and is desirous that the action of the District Court in the premises may be reviewed by the Supreme Court of the United States as the law in such cases provides, and fu-ther saith not.

(Signed) JIN FUEY MOY, *M. D.*

Sworn to and subscribed this 6th day of February, 1918.

(Signed) B. D. GAMBLE,
[SEAL.] *Deputy Clerk.*

Order.

And now, to-wit, this 6th day of February, 1918, the foregoing petition presented in open court, and on motion of John W. Dunkle and N. S. Williams, Esqs., attorneys for Jin Fuey Moy, the defendant above named, a writ of error is granted the said Jin Fuey Moy, defendant, to the Supreme Court of the United States as prayed for.

(Signed) W. H. S. THOMSON,
Judge of the United States District Court for the Western District of Pennsylvania.

Filed February 6th, 1918. J. Wood Clark, Clerk.

288 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1917.

No. 89.

UNITED STATES
v.
JIN FUEY MOY.

Citation.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at Washington, District of Columbia, on the first Monday of October next pursuant to a writ of error filed in the office of the District Court of the United States for the Western District of Pennsylvania, wherein Jin Fuey Moy is plaintiff in error and you are defendant in error, to show cause, if any you know or have, to say why the judgment rendered against the said Jin Fuey Moy as in said writ of error appears, should not be duly reversed and speedy justice done to the parties aforesaid in this behalf.

Witness my hand this 6th day of February, 1918.
(Signed) W. H. S. THOMSON,
Judge of the United States District Court for the Western District of Pennsylvania.

Service of the above citation accepted this 8th day of February, 1918.
(Signed) JNO. W. DAVIS.

289 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1917.

No. 89, Criminal Docket.

UNITED STATES
vs.
JIN FUEY MOY.

Exceptions.

Filed December 29, 1917. J. Wood Clark, Clerk.

And now, to wit, December 29, 1917, comes John W. Dunkle, Esq., and N. S. Williams, Esq., attorneys for the above named defendant,

Jin Fuey Moy, and, in addition to the exceptions taken to the charge of the Court at the trial, excepts to the following parts of said charge:

First. "Now, I say to you, as a matter of law that a physician under this Act, cannot dispense any of these narcotic drugs except to a patient; that is, to one who is the subject of medical or surgical treatment; the drugs being dispensed to such patient by the physician for medicinal purposes, in alleviating suffering or endeavoring to effect a cure. And a physician who prescribes such narcotic drugs to one not a patient violates the law. Or, if he dispenses or distributes such drugs in any way except in the course of his professional practice only, he is guilty of a violation of the Act in question."

Exception allowed and bill sealed.

(Signed) W. H. S. THOMSON. [SEAL.]

Second. "You are to determine, gentlemen, from all the facts and circumstances, from the testimony of the Government and from that offered on the part of the defense, whether Dr. Moy dispensed narcotic drugs only to patients in the course of his professional
290 practice, or whether he made a business of dispensing the drugs to the public generally as the — called for, merely seeking shelter behind the prescriptions which he issued. You have a right to consider the number of persons to whom he prescribed; whether they were known to him or were strangers; the character of the examinations, if any, which he made before prescribing; the number of prescriptions issued and the amounts prescribed to an individual at one time; whether he was endeavoring in good faith to treat them for the purpose of alleviating suffering or effecting a cure; or was making merchandise of narcotic drugs, feeding the depraved appetite of addicts, without reference to their mental and physical welfare, or any ultimate cure to be effected."

Exception is allowed and bill sealed.

[SEAL.] W. H. S. THOMSON.

Third. "If you find that he was prescribing narcotic drugs not in good faith and with an honest purpose to comply with the law, but was *dispensed* to the public generally as they were applied for, not in the course of his professional practice only, then he would be guilty under this indictment. He would not be entitled to the benefit of the exception under which he defends, because of his violation of its conditions, and would therefore be liable for a violation of Section 2, under which the indictment is drawn, of selling or dispensing such drugs without a written order from the purchaser, on order forms signated by the Act."

Exception allowed and bill sealed.

W. H. S. THOMSON. [SEAL.]

(Signed) JOHN W. DUNKLE.
(Signed) N. S. WILLIAMS.
Attorneys for Defendant.

Eo Die Exceptions overruled and bill sealed.

U. S. District Judge.

291 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1917.

No. 89.

UNITED STATES

vs.

JIN FUEY MOY.

Order Fixing Record.

Filed April 24, 1918. J. Wood Clark, Clerk.

And now to-wit, April 24th, 1918, this cause came on for hearing and after due notice and the Court after argument of Counsel upon due consideration orders and directs that the record in the above case be as set forth in the notice served and filed upon the United States Attorney, except that the record shall contain the prescriptions of Jin Fuey Moy as set forth in testimony filed pages 267 to 274.

PER CURIAM.

292 In the United States District Court for the Western District of Pennsylvania, November Term, 1917.

No. 89.

UNITED STATES

v.

JIN FUEY MOY.

Order Further Extending Time.

Entered March 5, 1918. J. Wood Clark, Clerk.

And now, to wit, March 5th, 1918, on motion of John W. Dunkle and N. S. Williams, Esqs., the return day of the citation issued February 6th, 1918, is extended for 60 days, that is to say until the 4th day of May, 1918.

(Signed) W. H. S. THOMSON,

Judge of the District Court of the United States for the Western District of Pennsylvania.

And now, to wit, May 4th, 1918, on motion of John W. Dunkle and N. S. Williams, Esqs., the return day of the citation issued February 6th, 1918, is extended to June 15th, 1918.

(Signed) W. H. S. THOMSON, *Judge*.

293 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1917.

No. 89.

UNITED STATES

v.

JIN FUEY MOY.

To E. Lowry Humes, Esq., United States Attorney, Pittsburgh, Pa.

SIR: You will please take notice that the undersigned attorneys for Jin Fuey Moy, defendant in the above entitled case, intend to print as the transcript of the record in the appeal to the Supreme Court of the United States in the above entitled case the following matters and things:

(1) Copy of Docket Entries.
(2) Indictment.
(3) Motion to quash the indictment.
(4) Opinion refusing motion to quash.
(5) Exceptions to same.
(6) The testimony of the following named witnesses as set forth in transcript filed March 5th, 1918, or so much thereof as indicated below:

Charles F. Geist	pages	2	to 5	
" " "	"	216	to 236	
Dr. Horatio C. Wood, Jr.	"	5	to 56	
W. T. Truxtem	"	81	to 91	
John A. Frew	"	91	to 144	
" " " (recalled)	"	199	to 204	
" " " (recalled)	"	285	to 287	
John Lewis	"	144	to 152	
John Capello	"	152	to 199	
Thomas McCaffery	"	204	to 215	
Dr. Adolph Hoeing	"	242	to 250	
G. C. Llewellyn	"	251	to 252	(inclusive)
Dr. John D. Milligan	"	275	to 282	"
Dr. Sydney D. White	"	291	to 305	
Dr. E. J. Trader	"	345	to 357	
Dr. E. R. Walters	"	384	to 388	
Mrs. Hatitia Moy	"	440	to 443	
Grace Moy	"	443	to 452	
		(267	to 274)	by Order of Court

(7) Motion to strike from record testimony of druggists and physicians—pages 288 to 290 (inclusive).
(8) The prescriptions of Dr. Moy as set forth in Counts 2, 3, 4, 5, 6, 7, 10 and 11.
(9) Motion in arrest of Judgment.
294 (10) Opinion refusing same.
(11) Exceptions to same.
(11½) Verdict & Judgment.
(12) Assignments of error.
(13) Petition and order allowing writ of error.
(14) Citation and service and extension thereof.
(15) Notice to U. S. Attorney as to what transcript of record shall contain.

And unless objections are filed with the Clerk of the United States District Court within five days from service hereof, the record will be printed as above indicated.

Respectfully,

JOHN W. DUNKLE,
N. S. WILLIAMS,
Attorneys for Jin Fuey Moy, Defendant.

Pittsburgh, Pa., March 5th, 1918.

Service accepted this 5th day of March, 1918.

JOHN M. HENRY,
Ass't U. S. District Attorney.

[Endorsed:] No. 89. November Term, 1917. United States v. Jin Fuey Moy. Notice to United States Attorney of what Defendant intends to print as the transcript of the record on the Appeal to United States Supreme Court. Notice of Contents of Transcript sur Writ of Error. Filed March 5th, 1918. J. Wood Clark, Clerk. John W. Dunkle, N. S. Williams, Attorneys for Defendant, Pittsburgh, Pa.

295 *Certificate of Exemplification.*

In the District Court of the United States for the Western District of Pennsylvania, Nov. Term, 1917.

No. 89, Crim. Dkt.

THE UNITED STATES

vs.

JIN FUEY MOY.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, J. Wood Clark, Clerk of the District Court of the United States, for the Western District of Pennsylvania, do hereby certify that the

annexed and foregoing pages contain a true and correct copy of the record sur Writ of Error in the above entitled case, so full and entire as the same remains of record and on file in my office, in the City of Pittsburgh, in said District.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said Court, at Pittsburgh, this 29th day of June, A. D. 1918.

[Seal of U. S. District Court, W. D. Pennsylvania.]

J. WOOD CLARK, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, Chas. P. Orr, District Judge of the United States, for said District, do hereby certify that J. Wood Clark, above named, was, at the time of making the above certificate, and is now, Clerk of the said Court, and that the said certificate made by him is in due form of law.

Pittsburgh, June 29th, 1918.

CHAS. P. ORR,
U. S. District Judge.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, J. Wood Clark, Clerk of the District Court, of the United States for the Western District of Pennsylvania, do certify that the Honorable Chas. P. Orr, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was, at the time of making thereof, and still is, Judge of the District Court of the United States in and for said District, duly commissioned and qualified; to all whose acts, as such, full faith and credit are and ought to be given, as well in the Courts of Judicature as elsewhere.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said Court, at Pittsburgh, in said District, this 29th day of June, A. D. 1918.

[Seal of U. S. District Court, W. D. Pennsylvania.]

J. WOOD CLARK, *Clerk.*

[Endorsed:] No. 89. Nov. Term, 1918. Crim. Dkt. District Court of the United States, Western District of Pennsylvania. United States v. Jin Fuey Moy. Exemplification of Record.

296 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you,

or some of you, between The United States of America, Plaintiff, and Jin Fuey Moy, Defendant, at No. 89 November Term, 1917, Criminal Docket, a manifest error hath happened, to the great damage of the said Defendant Jin Fuey Moy, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighth day of February, in the year of our Lord one thousand nine hundred and eighteen.

[Seal of U. S. District Court, W. D. Pennsylvania.]

J. WOOD CLARK,
Clerk of the District Court of the United States, W. D. of Penna.

Allowed by
W. H. S. THOMSON,
Judge U. S. District Court, W. D. of Pa.

[Endorsed:] #89—11—17. Crim. Jin Fuey Moy.

297 In the United States District Court for the Western District of Pennsylvania, November Term, 1917.

No. 89.

UNITED STATES

v.

JIN FUEY MOY.

And now, to wit, March 5th, 1918, on motion of John W. Dunkle and N. S. Williams, Esqs., the return day of the citation issued February 6th, 1918, is extended for 60 days, that is to say until the 4th day of May, 1918.

W. H. S. THOMSON,
Judge of the District Court of the United States for the Western District of Pennsylvania.

And now, to wit, May 4th, 1918, on motion of John W. Dunkle and N. S. Williams, Esqs., the return day of the citation issued February 6th, 1918, is extended to June 15th, 1918.

W. H. S. THOMSON, *Judge.*

[Endorsed:] No. 89. November Term, 1918. United States v. Jin Fuey Moy. Order of Court Extending Return Day of Citation Issued to the 1st day of May, 1918, & Order further extending time to June 15th, 1918. Entered Mar. 5th, 1918. J. Wood Clark, Clk. John W. Dunkle, N. S. Williams, Attorneys for Defendant.

208 2 Blank—General Order.

10–17–500.

Rule 14 [of]. All papers must be so endorsed as to disclose the general contents thereof; and all orders, decrees and rules to show cause submitted to the court by counsel must be prepared so that when served they will of themselves be self-explanatory.

In the District Court of the United States for the Western District of Pennsylvania, November Term, 1917.

No. 89, Crim. Dkt.

THE UNITED STATES

vs.

JIN FUEY MOY.

Order of Court.

Now, June 15th, 1918, the time for filing the Transcript of Record our Writ of Error to the Supreme Court of the United States, is hereby extended until July 1st, 1918.

W. H. S. THOMSON,
U. S. Dist. Judge.

[Endorsed:] 89. Nov. T., 1917. No. — Crim. United States District Court, Western District of Pennsylvania. In the matter of U. S. v. Jin Fuey Moy. Order Extending Time. Rule 14 requires endorsement of all papers.

209 In the District Court of the United States for the Western District of Pennsylvania, November Term, 1917.

No. 89.

UNITED STATES

v.

JIN FUEY MOY.

Citation.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at Wash-

ington, District of Columbia, on the first Monday of October next pursuant to a writ of error filed in the office of the District Court of the United States for the Western District of Pennsylvania, wherein Jin Fuey Moy is plaintiff in error and you are defendant in error, to show cause, if any you know or have, to say why the judgment rendered against the said Jin Fuey Moy as in said writ of error appears, should not be duly reversed and speedy justice done to the parties aforesaid in this behalf.

Witness my hand this 6th day of February, 1918.

W. H. S. THOMSON,
Judge of the United States District Court
for the Western District of Pennsylvania.

Service of the above citation accepted this 8th day of February, 1918.

JNO. W. DAVIS,
Sol'r Gen'l.

[Endorsed:] No. 89. November Term, 1917. United States v. Jin Fuey Moy. Citation. John W. Dunkle, N. S. Williams, Attorneys at Law, Pittsburgh, Pa.

Endorsed on cover: File No. 26,635. W. Pennsylvania D. C. U. S. Term No. 549. Jin Fuey Moy, plaintiff in error, vs. The United States of America. Filed July 6, 1918. File No. 26,635.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 161.

JIN FUEY MOY, *Plaintiff in Error*,

vs.

THE UNITED STATES.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS OF THE CASE.

The plaintiff in error, Dr. Jin Fuey Moy, a practicing physician, resident in the City of Pittsburgh, in the State of Pennsylvania, where he has been engaged in the practice of medicine for a number of years, was indicted and convicted for violating Section Two (2) of an Act of Congress approved December 17, 1914, known as the Harrison Anti-

Narcotic Act (38 Stats. at L., 785; 6 U. S. Comp. Stats. 1916, Section 6287 G).

The indictment (R., p. 3) contains twenty (20) counts, all of which are the same in form, the only difference being in the names of the persons to whom the drugs were distributed and the quantities of the drug distributed to such persons.

Dr. Jin Fuey Moy had registered his name and place of business as a physician with the Collector of Internal Revenue of the United States for the Twenty-third Internal Revenue Collection District of Pennsylvania, had paid to said collector the special tax therefor as required by law, and had been assigned United States Registry Number 4445 in said district.

As all twenty counts of the indictment are substantially the same, except as above stated, only the first will be set forth here for the information of the Court.

The first count is in words and figures as follows (R., p. 3):

> "The grand jurors of the United States of America, now inquiring in and for the Western District of Pennsylvania, after being duly impaneled, sworn, affirmed and charged at the term of said Court, now pending, upon their solemn oaths and affirmations, respectively, do present, that Jin Fuey Moy, late of said district, heretofore, to wit, on the twenty-ninth day of March, in the year of our Lord, one thousand nine hundred and seventeen, at Pittsburgh, in the County of Allegheny, in said Western District of Pennsylvania, and within the jurisdiction of this Court, was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, twelve drams of morphine sulphate, to one Dave G. Feigel, not in pursuance of a written order from said Dave G.

Feigel, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17th, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Dave G. Feigel, twelve drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Dave G. Feigel, a certain prescription, a copy of which is as follows:

"JIN FUEY MOY, M. D.
308 Grant Street.
Pittsburgh, Pa.

March 29, 1917.

Rx Dave G. Feigel, 1107 Payne Ave., Cleveland Ohio.
Morphine Sulphate.....3xii
Sig: Use as directed.
H19643.
3-29-17.

JIN FUEY MOY.
U. S. Registry No. 4445, 23rd District of Penna.

and the said Dave G. Feigel was not then and there a patient of the said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only; contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

SUMMARY OF PROCEEDINGS IN DISTRICT COURT.

Before the plea and before the jury was sworn in the case a motion to quash the indictment (R., p. 23) was made upon the grounds:

"First. The so-called 'Harrison Act' under which the indictment is found is unconstitutional and void.

Second. It violates the tenth amendment of the Federal Constitution, as to the reserved rights of the State, as said Harrison Act is an attempt to regulate commerce wholly within a State, and to exercise police powers thereon on the part of the United States.

Third. It violates said provisions in attempting to regulate the practice of medicines within the States.

Fourth. The indictment does not charge the defendant with the commission of any offense against the United States.

Fifth. The acts of the defendant averred in the indictment are not prohibited by law, nor are they in violation of any law of the United States.

Sixth. The indictment, as a whole, does not charge the defendant with the commission of any offense prohibited by the so-called 'Harrison Anti-Narcotic Act' or with the commission of an offense prohibited by any other law of the United States."

The District Court in an opinion (R., p. 24) overruled the motion to quash. An exception was made to this ruling of the Court; allowed; and bill sealed.

Thereupon the accused pleaded "Not Guilty," and the cause was proceeded with before the jury, testimony of witnesses, including druggists and physicians, was introduced and exhibits were brought forward.

At the close of the Government's case counsel for Dr. Moy moved to strike from the record (R., p. 109) all of the testimony of the druggists and physicians who had been examined touching and concerning the quantity or amount of the drug prescribed by Dr. Moy, or the proper amount of the drug prescribed by a physician that a druggist would or should fill, or that a physician should prescribe, or of charges or fees of a physician for the writing of prescriptions and examination, or the charges of the druggists for the drug, as wholly impertinent to the issue in this case, and

incompetent and irrelevant; there being nothing in the Harrison Anti-Narcotic Act limiting the amount or quantity of the drug that a physician may prescribe.

This motion to strike out was overruled and exception was noted (R., p. 161).

At the conclusion of the hearing and before giving the case to the jury the Court was requested by counsel for Dr. Moy to give certain instructions to the jury and to charge in a certain way upon certain points. Parts of the points were given as requested, parts given qualifiedly and in modified form, while others were refused in *toto*.

The jury returned a verdict (R., p. 171) of guilty as to the offenses charged in certain counts in the indictment and not guilty as to others charged in other counts, whereupon judgment (sentence) was entered (R., p. 172), the Court having overruled in an opinion (R., p. 167) a motion in arrest of judgment made by counsel for Dr. Moy (R., p. 166) upon the grounds:

> "First. The so-called 'Harrison Anti-Narcotic Act' is unconstitutional and void.
>
> Second. The so-called 'Harrison Anti-Narcotic Act' is unconstitutional and void, so far as it does or attempts to control and regulate the practice of a physician.
>
> Third. The indictment, as a whole, does not charge the defendant with the commission of any offense prohibited by the so-called 'Harrison Anti-Narcotic Act' or with the commission of an offense prohibited by any other law of the United States.
>
> Fourth. There was no competent evidence submitted on the part of the United States to sustain the verdict rendered by the jury."

To the overruling of this motion by the Court counsel for Dr. Moy excepted and on his motion exception was allowed and bill sealed.

Thereafter application for a writ of error to this Honorable Court was made for errors assigned in the rulings, decision and judgment below, and the writ having been allowed the cause is now before this Honorable Court for review.

THE ASSIGNMENT OF ERRORS (R., p. 172).

And now, to wit, January —, 1919, comes the defendant, Jim Fuey Moy, and in connection with his petition for writ of error herein makes the following assignment of errors which he states occurred upon the trial.

First. The Court erred in refusing to grant defendant's motion to quash the indictment, which motion was made before plea and before the jury was sworn in the case.

Second. The learned Court who tried this case, erred in answer given to the defendant's second point submitted at the close of the trial, which point and answer are as follows:

> "Second. Under the law and the evidence the verdict must be not guilty in the case at No. 89, November Term, 1917."
>
> Answer. "The first, second, tenth and thirteenth points have been refused; I will not read them."

Third. The learned Court erred in the answer to the eleventh point, which point and answer are as follows:

> "Eleventh. The Act of Congress under which the indictments are drawn does not limit the amount of morphine sulphate which a physician may prescribe to his patient; neither does said Act limit the amount of money the physician may charge his patient for writing the prescription."
>
> Answer. "The Act of Congress does not undertake to limit the morphine sulphate which a physician may

prescribe for his patient, nor the amount of his charge therefor, but, if the physician seeks protection under Exception (a) against the requirements of Section 2, it must appear that drugs were dispensed by him to a patient in the course of his professional practice only. And the amount of drugs so prescribed, and the charge therefor, may throw light on the question whether the drugs were in fact administered by the physician in good faith in the course of his professional practice only."

Fourth. The learned Court erred in the answer to the twelfth point, which point and answer are as follows:

"Twelfth. Before there can be a conviction of Jin Fuey Moy on the indictment at No. 89, November Term, 1917, the jury must find from the evidence, beyond a reasonable doubt, that the said defendant, Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously, sell, barter, exchange or give away some of the morphine sulphate to one or more of the persons named in said indictment."

Answer. "While the indictment charged the sales and dispensing of the drugs were feloniously made, if the jury are satisfied beyond a reasonable doubt that they were wilfully and knowingly so bartered, exchanged or given away by the defendants, in violation of Section 2, as charged in the indictment, the defendants would be guilty."

Fifth. The learned Court erred in the answer to the thirteenth point, which point and answer are as follows:

"Thirteenth. If the jury find from the evidence that each of the prescriptions mentioned in the indictment at No. 89, November Term, 1917, were written by Dr. Jin Fuey Moy, in his office, on the several dates mentioned in said indictment, that the person for whom each prescription was written came to his office and stated that he was addicted to the use of the drug,

giving the amount used, etc., and if before writing the prescription the doctor examined each patient, after which he wrote the prescription with instructions as to how to use it, and believing that it would be used by the patient, then the offense charged in the indictment was not committed and the verdict must be not guilty."

Answer. "The first, second, tenth and thirteenth points have been refused, and I will not read them."

Sixth. The learned Court erred in using the following language in the general charge which he delivered to the jury, to wit:

"Now, I say to you, as a matter of law that a physician, under this Act, cannot dispense any of these narcotic drugs except to a patient; that is, to one who is the subject to medical or surgical treatment; the drugs being dispensed to such patient by the physician for medicinal purposes, in alleviating suffering or endeavoring to effect a cure. And a physician who prescribes such narcotic drugs to one not a patient violates the law. Or, if he dispenses or distributes such drugs in any way except in the course of his professional practice only, he is guilty of a violation of the Act in question."

Seventh. The learned Court erred in using the following language in the general charge which he delivered to the jury, to wit:

"You are to determine, gentlemen, from all the facts and circumstances, from the testimony of the Government and from that offered on the part of the defense, whether Dr. Moy dispensed narcotic drugs only to patients in the course of his professional practice, or whether he made a business of dispensing the drugs to the public generally as they were called for, merely seeking shelter behind the prescription which he issued. You have a right to consider the number of persons

to whom he prescribed; whether they were known to him or were strangers; the character of the examinations, if any, which he made before prescribing; the number of prescriptions issued and the amounts prescribed to an individual at one time; whether he was endeavoring in good faith to treat them for the purpose of alleviating suffering or effecting a cure; or was making merchandise of narcotic drugs, feeding the depraved appetite of addicts without reference to their mental or physical welfare, or any ultimate cure to be effected."

Eighth. The learned Court erred in using the following language in the general charge which he delivered to the jury, to wit:

"If you find he was prescribing narcotic drugs not in good faith and with an honest purpose to comply with the law, but was dispensed to the public generally as they were applied for, not in the course of his professional practice only, then he would be guilty under this indictment. He would not be entitled to the benefit of the exception under which he defends, because of his violation of its conditions, and would therefore be liable for a violation of Section 2, under which the indictment is drawn, of selling or dispensing such drugs without a written order from the purchaser on order forms designated by the Act."

Ninth. The learned Court erred in refusing defendant's motion to strike from the record certain testimony, which motion and the rulings thereon are as follows:

"Mr. Williams, of counsel for the defense in this case, moved the Court to strike from the record all of the testimony of the druggists and physicians who have been examined touching and concerning the quantity or amount of the drug prescribed by Dr. Moy, or the proper amount of the drug pre-

scribed by a physician that a druggist would or should fill, or that a physician should prescribe or of charges or fees of a physician for the writing of prescriptions and examination, or the charges of the druggist for the drug, as wholly impertinent to the issue in this case, and incompetent and irrelevant; there being nothing in the Harrison Anti-Narcotic Act limiting the amount or quantity of the drug that a physician may prescribe. (U. S. vs. Friedman, 224 Fed. Rep., 276)."

"If the Court should be of the opinion that the provisions of said Harrison Act, or regulations passed pursuant thereto, does or do limit the amount or quantity of the drug to be prescribed by a physician, then it is respectfully urged that any such provision is ultra vires and void; no power having been delegated to the Congress of the United States to pass legislation of this character, such legislation would be an exercise of the police power reserved, under the Federal Constitution, to the several States and the people thereof. That, under the Federal Constitution, the police powers of Congress, in Revenue laws, is limited to the protection and collection of the tax imposed; that Congress has nothing whatever to do with the moralities of the article or traffic taxed. That this is true is shown by an analogy in liquor cases, in the taxing power of Congress over whiskey, under its police power, they have passed many statutes and regulations imposing penalties and punishments for the non-payment of taxes imposed upon those liable to the tax, and for violation of the acts and regulations relating to the collection of taxes. For example, that proper stamps be affixed, the cancellation of stamps, defacing the same, exhibiting or posting the receipts showing tax paid by a wholesale or retail liquor dealer, and so on; but not a law or regulation against the evils of the sale or giving away of the liquor. A dealer can sell to persons of known intemperate habits, to minors, on Sunday, etc. These evils are left to the

State to be dealt with. And it has never been contended that the Government, by Congress, had police powers in such cases."

"And for this reason we submit that the Harrison Act is unconstitutional. (U. S. vs. De Witt, 9 Wall., 41.)"

By the Court: "It being clear, under the provisions of the Harrison Anti-Narcotic Act, that none of the drugs in question may be imported, manufactured, sold, dealt in, distributed, or even given away, except for medicinal purposes, the motion to strike out is overruled."

"Exception noted to defense."

Tenth. The learned Court erred in refusing to allow Mrs. Hatitia Moy, wife of the defendant, to testify, which refusal appears in the following extract from the record:

"Mrs. Hatitia Moy, called in behalf of defense, sworn.

"Mr. Humes: If the Court please, in the light of the knowledge of defendants' counsel, it strikes me that this is rather unprofessional.

"Mr. Marshall: Unprofessional, did you say? As this was ruled on before, I don't see how I can have it ruled on now, without having the witness called.

"Q. You are the wife of Dr. Moy?

"A. I am.

"Q. Do you live with him?

"A. I certainly do.

"Q. How long have you been married?

"A. Almost twenty-nine years.

"Q. And where do you live?

"A. I live at 208 Grant Street.

"Mr. Humes: If the Court please, it strikes me that this is a matter that the Court ought to take notice of under the law.

"By the Court: I think not, unless there is an objection.

"Mr. Humes: Well, we object to the testimony of this witness.

"By the Court: You object to the competency of the witness?

"Mr. Williams: If the Court please, the rule of the United States Court, as I apprehend it, is that in criminal cases the competency of the witness is to be determined by the law as it was at the time of the First Judicial Act of Congress, unless it has been changed by subsequent legislation.

"By the Court. Yes.

"Mr. Williams. I submit that the wife was an incompetent witness at that time. The only question is whether there has been subsequent legislation, and I submit to your Honor, on the authority of Logan vs. U. S., that the Supreme Court of the United States has never passed upon the Act of 1862."

Counsel here quoted from the opinion of Mr. Justice Gray in the above cited case; and also cited other authorities in support of his position.

After discussion by counsel for the Government, the following ruling was made.

"By the Court. As I understand the rule of evidence, whether the witness is competent or incompetent in the United States Court depends upon her competency or incompetency at the time the Judicial Act was first passed. At that time the wife was an incompetent witness for the husband, she remains incompetent, unless enabled to testify by a subsequent Act of Congress. The Act of 1862, as I understand it, refers to Acts of common law, in equity and in admiralty, and does not apply to criminal cases. The objection is therefore sustained, and an exception noted to the defendants.

"Mr. Marshall, of counsel for the defense, made the following offer at the side bar, not in the hearing of the jury:

"The defendant offers the wife of Dr. Moy, now on

the stand, intending and offering to prove by her, in contradiction of the testimony of one Frew, alias Henry, wherein he testified that he did not take a woman to the office of Dr. Moy; by showing by the testimony of the witness, the wife of Dr. Moy, one of the defendants, that she was present at the office of Dr. Moy when Henry came there on two different occasions with a woman. And also for the purpose of contradicting Mr. Oyler, a witness produced on the part of the Government, as to what took place at the time of his visits to Dr. Moy.

"Counsel for Government object to the competency of the witness.

"By the Court: As I understand the witness to be incompetent to testify to anything in favor of her husband in this criminal proceeding, the objection is sustained and an exception noted for the defendants."

Eleventh. The learned Court erred in each and every particular of its general charge to the jury in this: to wit, that the Court should have withdrawn the issues from the jury and directed a verdict for the defendant.

Twelfth. The learned Court erred in refusing to grant defendant's motion in arrest of judgment.

Thirteenth. The learned Court erred in overruling motion made by defendant in arrest of judgment.

Fourteenth. The learned Court erred in pronouncing judgment after motion made in arrest of judgment.

(Signed)

THE QUESTIONS PRESENTED TO THIS HONORABLE COURT FOR DECISION.

First. The constitutionality of the Act of December 17, 1914, known as the Harrison Anti-Narcotic Act, 38 Stats. at L., 785, 6 U. S. Comp. Stats., 1916, Section 6287 G; with special reference to Section 2 of said Act, under which the indictment in the instant case is found.

Second. Whether or not the Harrison Act is an attempt on the part of the Federal Government, through its Congress, to regulate commerce wholly within a State, and to exercise police powers therein, in contravention of the Tenth Amendment of the Federal Constitution, which reserves the power to regulate such matters to the several States.

Third. Whether or not the Harrison Act is invalid and unconstitutional in so far as it attempts to regulate the practice of medicine wholly within a State.

Fourth. Whether or not the Harrison Act is an attempt by the Federal Government, under the guise of tax and revenue legislation, to regulate matters and exercise powers wholly within the limits of the legislative authority of the several States, and by so doing to encroach upon the powers and rights expressely reserved to the several States by the Tenth Amendment to the Constitution of the United States.

Fifth. Whether or not the indictment charges Dr. Moy with the commission of any offense against the United States.

Sixth. Whether or not the acts of Dr. Moy averred in the indictment are prohibited by law or are in violation of any law of the United States.

SECTION TWO OF THE HARRISON ACT.

Section 2 of the Harrison Anti-Narcotic Act, approved December 17, 1914, 38 Stats. at L., 785; 6 U. S. Comp. Stats. 1916, Section 6287 h, under which the indictment in this case is found is in identical words and figures as follows:

BRIEF AND ARGUMENT.

Section 2 of the Act of Congress (Harrison Act), under which the indictment is found, leaving out all formal parts, provides:

"That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. * * *"

The Act continuing provides that the *person selling* the drug shall preserve the order for two years, subject to inspection by the Commissioner of Internal Revenue, and that the purchaser shall keep a duplicate of his order so that it may be inspected likewise * * * then comes the provision * * * "nothing contained in this section shall apply—(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician * * * *registered under this Act in the course of his professional practice only:* provided, that such physician * * * *shall keep a record of all such drugs dispensed and distributed*, showing the amount * * * the date, the name and address of the patient * * * except such as may be dispensed to a patient upon whom such physician * * * shall personally attend; and such record shall be kept for a period of two years * * *."

The several duties of the collectors of internal revenue are next set forth.

Then comes the provision:

"It shall be unlawful for any person to obtain by means of said order forms (the order form prescribed) any of the aforesaid drugs for any purpose other than the use, sale or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession * * *."

The first count of the indictment (R., p. 3) charges that Dr. Moy "was a practicing physician, and at the time

and place aforesaid he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to-wit, twelve drams of morphine sulphate, to one, Dave G. Feigel, not in pursuance of a written order from the said Dave G. Feigel, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of Section 2 of an Act of Congress approved December 17, 1914, and known as the Harrison Anti-Narcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Dave G. Feigel, twelve drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Dave G. Feigel, a certain prescription, a copy of which is as follows (here is set forth the prescription showing among other things Dr. Moy's registration number obtained by him when he paid the internal revenue tax) and the said Dave G. Feigel was not then and there a patient of the said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only; contrary to the form of the Act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

All of the remaining counts of the indictment up to and including the twentieth and last are substantially the same, varying only as to the name of the person to whom the drug was sold, the quantity and the time of the transaction.

The Harrison Act is a revenue measure or taxing law and just so far as its provisions provide for the laying

and collecting of taxes it is a valid exercise of the power and authority of the Federal Congress in this regard.

United States vs. Jim Fuey Moy, 241 U. S., 394.

The Constitution of the United States gives to the Congress of the United States the power and authority, under Article 1, Section 8:

> "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and General Welfare of the United States; but all Duties, Imports and Excises shall be uniform throughout the United States."

It is our contention that the provisions of Section 2 of the Harrison Act go further than they should as provisions calculated to lay a tax and provide for its enforcement and collection and that they undertake to regulate the traffic in drugs wholly within the borders of the States and operate as regulations of the practice of medicine wholly within a State and that these provisions are for this reason an encroachment upon the police powers expressly reserved to the several States by the 10th Amendment to the Constitution of the United States which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

The grant of power to Congress over the subject of laying and collecting taxes, duties, imposts and excises was to enable it to exercise its Federal power in regard to such matters, and not to give it authority to control the States in their exercise of the police power over local matters.

Opium is said to be an outlaw drug. One of the purposes of the Harrison Act is to prohibit its importation. United States vs. Brown, 224 Fed. 137. The Harrison Act also prohibits its interstate transportation except under stringent regulations. But it is also known to the medical science that opium and its derivatives, in medicine and surgery have proven invaluable for the alleviation of pain, and are used to a greater extent, perhaps, than any other known drug possessing similar narcotic properties. The necessity for its importation and the safeguarding of its use and abuse is evidence by even a casual search into its history, uses and abuses.

It is therefore readily seen that opium and its derivatives have effect for good or for evil, depending on circumstances, upon the health and morals of the community. Legislation looking to the regulation of traffic in opium and its derivatives in order that the health and morals of the people of the community is clearly within the police power, because, as stated by Mr. Justice Bradley, in this Court's opinion in the case of Beer Co. vs. Massachusetts, 97 U. S. 33, speaking of the police power of the legislature of Massachusetts:

> "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals."

Within the scope of the exercise of the police power which the states have reserved to themselves within their respective limits, the practice of medicine is readily comprehended. Meffert vs. Packer, 195 U. S., 625, affirming Meffert vs. Med. Bd., 66 Kans., 740. Therefore how can

the Harrison Act validly undertake to regulate the practice of medicine wholly within a State by prescribing that an act shall be done in the course of legitimate practice of the profession only.

The Supreme Court of Kansas in the case of Meffert vs. the State Board of Medical Registration and Examination, 66 Kans., 749, held,

> "The clause in the Fourteenth Amendment to the Constitution of the United States, 'Nor shall any state deprive any person of life, liberty, or property, without due process of law' is not a limitation upon the police power of the state to pass and enforce such laws as in its judgment will inure to the health, morals and general welfare of its people."

"The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution." Hammer vs. Dagenhart, 247 U. S., 274.

In the matter of Yun Quong (1911), 159 Cal. 508, the petitioner was arrested and detained on a charge of violating Statutes of California, 1909, p. 422, entitled, "An Act to regulate the sale and use of poisons in the State of California, and providing a penalty for the violation thereof." He applied for a writ of Habeas Corpus. The Court held:

> "When it is determined that any act is within the police power of the State, nothing further need be said. The rest is left to the discretion of the law-making power in the exercise of that plenary power in the State, which enables it to prohibit all things hurtful to the public welfare.
>
> "Opium is an active poison, which has no beneficial use except as a medicinal drug; and its unre-

> stricted use would have a debasing and harmful effect on the moral and economic welfare of a large portion of our population; and the act which permits its use under all circumstances, while otherwise prohibiting its possession, is a valid regulation within the general police power of the Legislature."

Mr. Willis Reed Bierly in Police Power State and Federal, Sec. 1, Ch. 2, says:

> "To comprehend the delimitation between Federal and State police power it is necessary to keep in view the distinctions between Federal and State Constitutions. In the Federal Constitution all powers not conferred by the States are reserved to the States, in addition to those powers expressly reserved. (1) In a State Constitution all powers not reserved thereon from the domain of legislation are conferred upon the legislative power. (2) Thus, there, the Federal power is supreme and the State power must give way, in all cases where Congress and the President are expressly given control of the subject matter, and such power may be exercised anywhere within the United States or its territories. And, on the other hand, with respect to the subjects not granted to the United States, the States severally are supreme within their respective jurisdictions."

Police regulations relating to the internal trade and domestic affairs of the States have been uniformly recognized as within such control (Hammer vs. Dagenhart, *supra*). "This," said this Court in United States vs. De Witt, 9 Wall. 41, 45, "has been so frequently declared by this Court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion." See Keller vs. United States, 213 U. S., 138, 144, 145, 146; Cooley's Constitutional Limitations, 7th ed., p. 11.

The power of Congress to lay and collect taxes, in its sphere of legislation may be compared with its broad power over inter-state commerce of which Chief Justice Marshall (9 Wheat. 203) said:

> "They (inspection laws) act upon the subject before it becomes an article of foreign commerce or commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating internal commerce of a State, and those which respect turnpike-roads, ferries, etc., are component parts of this mass."

In the famous case of Dartmouth College vs. Woodward, 4 Wheat. 518, 629, Chief Justice Marshall again says, "That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed may be admitted."

It is submitted that, where a licensed physician such as Dr. Moy, registers, pays the tax, and obtains a narcotic drug on a form provided by the Commission of Internal Revenue, or where such a physician, having registered and paid the tax, issues a prescription to a consumer directly, he having paid the tax or revenue sought to be raised by the Harrison Act, and by such prescription enables the consumer to procure the drug, he (the physician) has a right, so far as Federal interference and regulation is concerned, to dispense directly to the consumer without requiring that consumer to present an order on a form pre-

scribed by the Commissioner of Internal Revenue, and that that part of Section 2 of the Harrison Act prohibiting such disposition is an attempt on the part of Congress to usurp and encroach upon the reserved police power of the State by enacting a police regulation, governing such traffic wholly within the limits of the State, which Congress has no power to do. The Harrison Act, therefore, to the extent to which it undertakes to do this, is an invasion of the reserved power of local regulation inherent in the State governments and in violation of the Constitution of the United States, Article 1, Section 8.

A statute must be judged by its natural and reasonable effect. Collins vs. New Hampshire, 171 U. S., 30, 33, 34. The control by Congress over Federal taxation cannot authorize the exercise of authority not intrusted to it by the Constitution. The maintenance of the authority of the States over matters purely local such as the regulation of the drug traffic wholly within their respective boundaries, is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters entrusted to the National Government by the Constitution.

In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government within which the police regulation of drug traffic is readily comprehended and to the States and to the people the powers not expressly delegated to the Federal Government are reserved. Lane County vs. Oregon, 7 Wall. 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. Hammer vs. Dagenhart, *supra;* New York vs. Milan, 11 Pet., 102; Slaughter House Cases, 16 Wall., 36, 63.

For this Court to sustain the Harrison Act in the instant case would not be a recognition of the lawful exertion of congressional authority, but, on the contrary, would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress.

In Hammer vs. Dagenhart, *supra*, Mr. Justice Day, referring to an Act of Congress intended to prevent interstate commerce in the products of child labor, said:

> "We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution."

The next question presented is has an offence against the laws of the United States been committd by Dr. Moy, or are the acts of omission and commission averred in the indictment in violation of any law of the Untied States?

In testing the question of constitutionality thus raised the controlling factor is whether or not the acts of omission and commission charged as offenses in the indictment are to be regarded "as means to effectuate the objects of the act in respect of revenue." In re Kollock, 165 U. S., 526, 537.

In the Kollock Case, *supra*, Chief Justice Fuller in the course of the opinion expressed the following, with reference to the Oleomargarine Act of August 2, 1886, C. 840; 24 Stats., 209:

> "The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue. * * * The oleomargarine legislation does not differ from this (laws relating to distilled spirits and tobacco), and the object is the same in both, namely, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue. Protection to purchasers in respect to getting the real, and not a spurious, article cannot be held to be the primary object in either instance, and the identification of dealer, substance, quantity, etc., by marking and branding, must be regarded as means to effectuate the objects of the act in respect of revenue."

The responsibility is with this Court to see that the revenue ends for which the Harrison Act was enacted are reached through it as a revenue measure and within the limits of Congressional authority acting through a revenue measure, so as not to permit the Federal Congress, under the coating and guise of revenue legislation, to undertake to regulate the internal affairs of a State as it has undertaken to do in the Harrison Act.

The test laid down by Chief Justice Fuller in the Kollock Case, *supra*, can be readily applied to Dr. Moy's case. Is the sale of the morphine sulphate by Dr. Moy to the several persons as charged in the indictment as being "not in pursuance of the written order" required by the Harrison Act, to be regarded as a means to effect the objects of the Act in respect of revenue or is not the requirement of a written order merely an unwarranted Federal regulation of the intra-State business? And further is the sale of morphine sulphate by Dr. Moy, as charged in the indictment to have been not in the course of his professional practice as a physician to be regarded as a means to effect the object of the act in respect of revenue?

In making these tests the truth of the charges in the indictment is assumed.

The unquestioned purpose of the Harrison Act is to provide for a tax and, having done so, to enforce its collection and payment in conformance with certain proper regulations by prescribing a penalty for failure to comply with its provisions to the end that revenue may thus be raised for the Federal Government. Therefore, any regulation or provision of law which *aids* in the enforcement of the collection and payment of this tax is within the power and authority of Congress. In re Kollock, *supra*.

The Record shows that Dr. Moy is a physician who had duly registered and paid the special tax prescribed by the act thus meeting its requirements in this regard.

It is not made to appear in what way the provision of the Act requiring that a written order must be given by the purchaser to the seller renders effective the enforcement or collection of the tax levied, especially is this true in the instant case, where the special tax is shown to have been paid and the registration requirements properly complied with. On the other hand, it would seem to be clear, looking at the provision of the Act as to this requirement, that it has an important bearing as a police measure and regulation, in tending to safe-guard the dispensing and distribution of the drug so that such dispensing and distribution may be limited to persons actually in need of it as a medicine.

But the regulation of such dispensing and distributing is a matter within the reserved authority of the several States under their police power to protect the health and morals of their citizens.

When the whole Act is considered together and consideration is given to the effect of each of its provisions one is driven to the conclusion that greater efforts are made, by the provisions of the Act, to protect against and

prevent the misuse of the drug than to its enforcement as a revenue act.

Let us consider in this respect paragraph (a) of Section 2 of the Act. There the provisions requiring the drug to be dispensed by a physician "in the course of his professional practice only," after the physician has complied with the provisions of the Act so far as, he, as a physician is concerned, and has registered and paid the tax as the revenue part of the Act requires, can only be police regulations looking primarily to the protection of the public against the abuse of this drug, and not remotely serving as an aid or means to effect the object of the Act in respect of revenue.

Again in the last clause of Section 2 of the Act, the sole purpose and intent appears conclusively to be to provide a police regulation rather than a revenue law.

In Blunt vs. The United States, 255 Fed., 336, Mack, Circuit Judge said, speaking of this clause of Section 2:

> "No question of tax or revenue or the protection or security thereof is involved; under this clause it is declared unlawful for a physician who has paid the required license fee and has bought the order form essential to obtaining the drug, to consume it himself as a drug addict or to give it away or to sell it except in the legitimate exercise of his profession. In our judgment this prohibition has no relation whatsoever to the taxing power of Congress; it is exclusively an attempt in the guise of an incidental tax regulation, to exercise the police powers reserved to the State."

The State of Pennsylvania, wherein the acts alleged as offenses were omitted and committed, by an Act approved July 11, 1917, Laws of Pennsylvania, 1917, p. 758, No. 282, entitled:

> "An Act for the protection of the public health by regulating the possession, control, dealing in, giving away, delivery, dispensing, administering, prescribing and use of certain drugs, and keeping records thereof; by regulating the use of drugs in the treatment of the drug habit; by providing for the revocation and suspension of licenses of physicians, dentists, veterinarians, pharmacists, druggists, and registered nurses for certain causes, and providing for the enforcement of this act, and penalties."

has within its sovereign capacity undertaken to regulate traffic in drugs, their use and abuse.

By the terms of this Act of the Legislature of Pennsylvania, we find that that State, before the commission of any of the alleged offenses upon which Dr. Moy's conviction is based, in the exercise of its reserved power of domestic regulation, passed a law, penal in character, which regulated, restricted and limited the sale and disposition of opium and its derivatives.

The provisions of the Pennsylvania Act are, in many particulars, substantially the same as those in the Harrison Act.

The enactment of local police laws, regulating and restricting the use of opium and its derivatives, and their similarity with the provisions of the Act of Congress (Harrison Act) are conclusive of the purpose on the part of the State of Pennsylvania to exercise its power to regulate; and persuasive that the inclusion of the same provisions in a taxing measure by Congress was to further the same moral ends that prompted the legislature of the State in enacting the State law.

The Harrison Act provides the registration and the payment of a special tax of $1.00 per annum by "every person" including physicians, having to do with drugs, and then proceeds to so restrict and narrow the uses of the

drugs that no appreciably large amount of revenue could reasonably be expected.

Section 9 of the Harrison Act fixing the penalty for non-compliance or violation provides, 6 U. S. Comp. Stats., 1916, Section 6287-0; 38 Stats., 789:

> "Any person who violates or fails to comply with any of the requirements of this Act shall, on conviction, be fined not more than $2,000, or be imprisoned not more than five years, or both, in the discretion of the court."

This section read in connection with section 335 of the Federal Penal Code, Act of March 4, 1909, C. 321; 35 Stats., 1152; Comp. Stats., 1913, Section 10,509,

> "All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors."

Speaking with reference to this penalty fixed by the Harrison Act the Court in United States vs. Woods, 224 Fed. 279 said,

> "Any person convicted of its (Harrison Act) most trivial violation—the most law-abiding druggist or physician or like person in legitimate possession of the drugs, who inadvertently allows the annual tax to become delinquent for a day—though fined but $1.00, is made a felon and infamous! And this for a mere legal infraction, and not a true crime, is a consequence shockingly disproportionate to the offense, is antagonistic to sound criminal economics, and is abhorrent to justice."

The tax thus provided for is extremely nominal, yet the penalty for a violation of any provision of the Act is so

disproportionate to the gravamen of the offense as to be further convincing that Congress was more concerned with the moral ends to be subserved by a regulation of the traffic than with the revenue to be derived.

In United States vs. Wilson, 225 Fed., 83, the Court held that the Harrison Act was a criminal statute and that therefore it must be strictly construed.

In Mugler vs. Kansas, 123 U. S., 623, 661, referring to the so-called prohibition statute of Kansas, attacked in that case as unconstitutional, being in effect a confiscation of property under the pretense of protecting the public morals, health and safety, this Honorable Court, speaking through Mr. Justice Harlan, said:

> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Applying this rule and mindful that the statute is "criminal as well as revenue measure," it would seem to be this Court's duty to see that the real purpose of the Act as a revenue measure is carried into effect, and that those provisions of the Act regulating and restricting trade in the named drugs are confined to their proper incidental functions, as said by Chief Justice Fuller, *supra*, "as means to effectuate the objects of the Act in respect of revenue."

Repeating for the sake of emphasis, it is respectfully submitted that it does not appear that the sale of the drug by Dr. Moy to a person not made in pursuance of that person's written order, as required by the Act; and that the sale by Dr. Moy "not in the course of his professional prac-

tice only" tend to effect, hinder or delay the effectual collection of the revenue tax imposed by the Act.

Substantially the same provisions are embodied in the laws of the State of Pennsylvania, *supra*, which in their enactment show an exercise of those reserved sovereign powers of internal regulation conceded as the right of the State.

To extend the incidental moral objects of the taxing measure by a liberal construction of its constitutionality would be to encroach upon the sovereign powers of the States.

This encroachment should not be permitted, especially where doubt exists (as here) as to whether the questioned provisions of law were means which reasonably tend to render effectual the enforcement of the law by the registration and payment of the tax imposed by it.

It is therefore respectfully submitted that the indictment does not state an offense against the laws of the United States in that the acts of Dr. Moy charged in the words of the statute itself to have been omitted and committed are violations of police regulations incidental to the taxing purpose of the Act, and do not tend to render effectual its prime object, revenue.

To this extent the Harrison Anti-Narcotic Act is in violation of the Tenth Amendment to the Constitution of the United States, and, therefore, unconstitutional and void.

OPPOSING AUTHORITIES.

In the case of United States vs. Doremus, decided by this Court on March 3, 1919, substantially the same questions as those contained in the instant case were presented. The majority of the Court held the Harrison Act in so far as Section 2 is concerned to be constitutional. The Chief Justice dissented because he was of the opinion "that the

Court below correctly held the Act of Congress, in so far as it embraced the matters complained of, to be beyond the constitutional powers of Congress to enact because to such extent the statute was a mere attempt by Congress to exert a power not delegated, that is, the reserved police power of the States."

Mr. Justice McKenna, Mr. Justice Van Devanter and Mr. Justice McReynolds concurred in this dissent.

It is submitted that the majority of the Court erred in holding that Congress had the power to declare the sale of drugs to a consumer unlawful, unless made in pursuance of a form issued or furnished by the Commissioner of Internal Revenue; and the dissenting opinion states the law correctly.

Treating the Act of Congress upon which the indictment is based as a revenue measure the power to tax and make provisions and restrictions to insure the certain and prompt collection of all taxes provided for, is not questioned, but the Act goes much further than this and encroaches upon the reserved power of the States to regulate their own internal matters of police.

Exactly the same may be said of the decision of this Court in the case of Webb and Goldbaum vs. The United States decided at the same time with the same majority and the same dissent.

Respectfully submitted,

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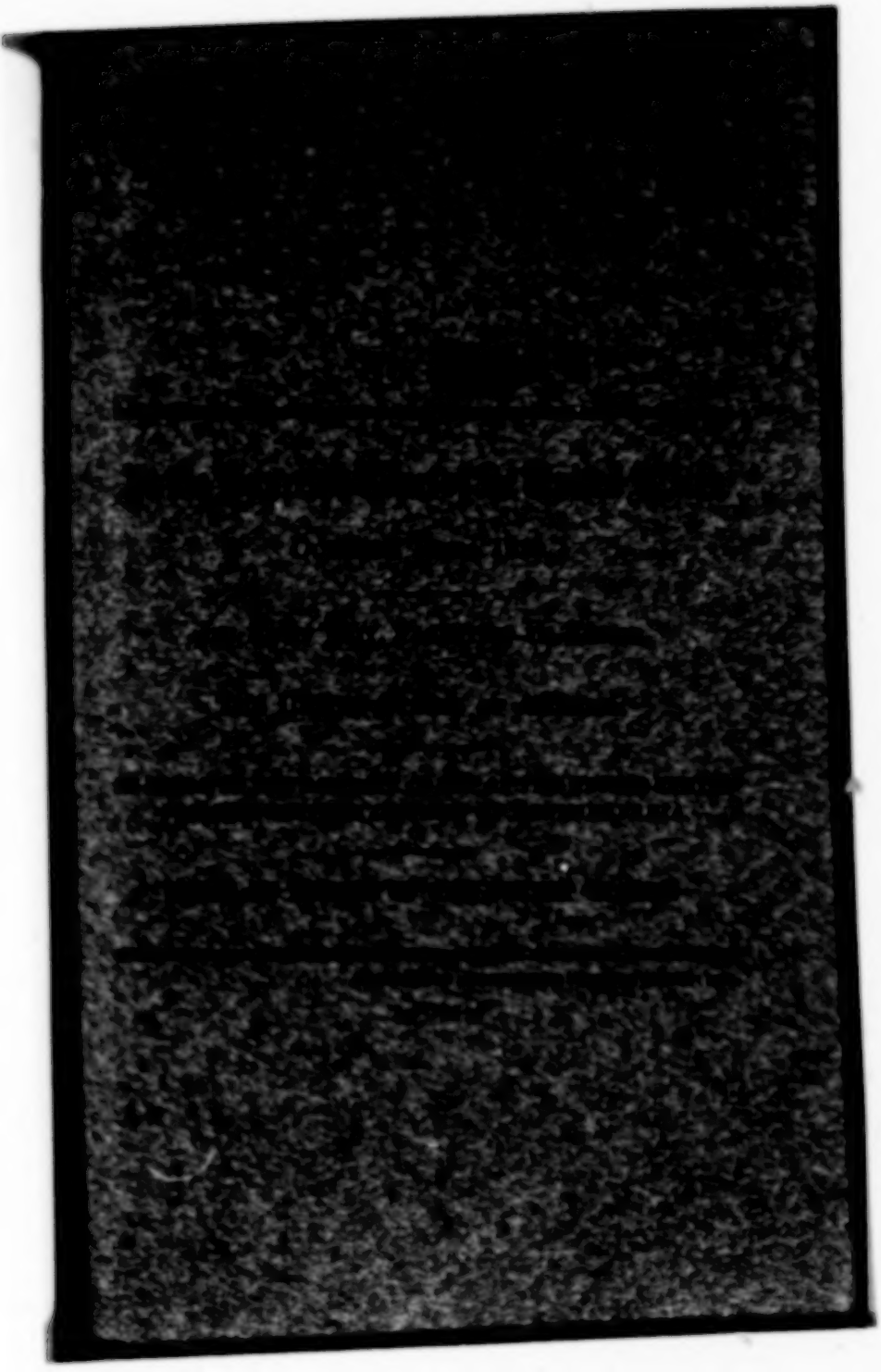

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

JIN FUEY MOY, PLAINTIFF IN ERROR
v.
THE UNITED STATES OF AMERICA. } No. 161.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

The plaintiff in error was convicted of a violation of section 2 of the so-called Harrison narcotic act of December 17, 1914, c. 1, 38 Stat. 785; Comp. Stat. sec. 6287h, in that he sold, dispensed, and distributed a derivative of opium—morphine sulphate—not in pursuance of a written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, but by means of a pretended prescription given, not in the course of his professional practice, to a person who was not his patient (R. 3, 4). (See *Webb* v. *United States*, 249 U. S. 96, 99, 100.)

The record in the case shows that defendant was indicted for twenty separate transactions, in which it

is charged the defendant Moy did unlawfully, wilfully, knowingly, and feloniously sell, barter, exchange, give away, dispense, and distribute under twenty different prescriptions, issued at different times from March 25, 1917, to May 8, 1917, an aggregate of 255 drams of morphine sulphate, and issued and dispensed the same to the parties named by issuing to each of the parties, under each of said transactions, prescriptions for said morphine sulphate, the parties not being patients of the said Moy, and the said Moy not acting in the course of his professional practice only. (R. 3–22.)

The evidence in said case showed that all of these prescriptions were filled at the drug store of the Joseph Fleming & Son Company (R. 27, 39–42). A dram contains sixty grains, or one-eighth of an ounce. The ordinary dose to alleviate pain is from one-twelfth to one-quarter of a grain (R. 29). The largest amount which the Government physician testified he had given to an addict was about twenty grains a day, generally less (R. 39). The evidence further showed that when a party desired to get morphine and went to the store of Fleming he was directed to Moy to obtain a proper ticket (R. 53); and when he went to Moy he was told to go to the Fleming Drug Company to get the morphine, and that they did business together (R. 57); also that the prescriptions were paid for according to the quantity of morphine therein at the rate of $1.00 for each one-eighth of an ounce (R. 57).

The very large extent of the sales and distribution of morphine made by Dr. Moy through prescriptions filled at the drug store of the Joseph Fleming & Sons Company within a space of about two years, the same aggregating 15,796 drams of sulphate of morphine, is shown on Record pages 117–120.

The writ of error in this case was allowed on February 6, 1918 (R. 178.)

ARGUMENT.

The case is brought here on the ground that the narcotic act is unconstitutional. (See plaintiff in error's brief, pp. 13–14.) This is expressly stated in the first four points stated under the head "Questions presented to this honorable court for decision." It is also the question presented under the fifth and sixth points, as shown by the brief on pages 23 *et seq.*

That these acts are constitutional, and that the questions herein involved are settled by the decision of this court, is plain. (*United States* v. *Doremus*, 249 U. S. 86; *Webb et al.* v. *United States*, 249 U. S. 96.)

The point raised upon the indictment likewise is settled by these cases. The point (R. 21; brief pp. 2–3 *et seq.*) raised is that Dr. Moy is not guilty of furnishing morphine in violation of the act to one who did not present an order therefor on forms issued by the Commissioner of Internal Revenue, because the provisions of the act, when required in the case of a registered physician, although he is not treating a patient or prescribing in the course of his legitimate professional business, are not legitimate provisions

intended to promote the lawful purposes of the statute, but are an invasion of the police powers of the State (see brief, pp. 23 *et seq.*).

The indictment clearly charges that Moy was dispensing or otherwise disposing of morphine to persons not patients, and not in the line of practice of physicians, through the means of prescriptions. How this could be done is made perfectly clear by the uncontradicted evidence in the case which demonstrates that by this means he was disposing of, dispensing, distributing, and selling morphine in the hands of Fleming & Company, charging therefor, according to the volume of drug stated in the prescription, a substantial purchase price based upon the quantity of drug and not upon the medical skill or advice but as an act of participation in the disposition of the drug.

The sole question made by the plaintiff in error is that the indictment does not charge an offense because, where a physician has registered and issues prescriptions *under any circumstances*, to require of him not to dispose of drugs through prescriptions, or otherwise, to persons not under his treatment as patients or in the course of his practice, is an unlawful invasion of the police powers of the State, and that therefore no violation of the act is shown.

That such prescriptions, so called, are not true prescriptions, and that the physician thus participating in the sale of the drug, like any other participant who disposes of the same otherwise than to one pre-

senting the order required, would be guilty of a violation of the act is clearly settled by the case of *Webb* v. *United States* (249 U. S. 96).

CONCLUSION.

It is respectfully submitted that the judgment of the court below should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 1[redacted]44

JIN FUEY MOY, *Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE D[redacted]TRICT COURT OF THE UNITED STATES FOR THE WEST[redacted]RN DISTRICT OF PENNSYLVANIA.

SUPPLEMENTAL BRIEF FOR THE PLAINTIFF IN ERROR.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 161.

JIN FUEY MOY, *Plaintiff in Error*,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

SUPPLEMENTAL BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The facts in this case are substantially set out in the original brief for the plaintiff in error, but this supplemental brief is filed for the purpose of bringing additional argument to the attention of this court and such facts as are

necessary to show upon what this argument is based, will be set out anew.

The plaintiff in error, defendant below, was indicted under section 2 of the Harrison Anti-Narcotic Act. The indictment (R. pp. 5-22) was in twenty (20) counts, all of which were identical except in the names of the persons, dates, and quantities in the prescriptions. One of these counts, which is typical of all, is set out in full in the original brief and charges:

> "* * * that Jin Fuey Moy, * * * was a practicing physician, and * * * did * * * sell, barter, exchange and give away derivatives and salts of opium * * * that is to say, that * * * he * * * did * * * sell, barter, exchange, give away, dispense and distribute to Dave G. Feigel * * * morphine sulphate, in manner following, to-wit, that said Jin Fuey Moy * * * did issue and dispense to said Feigel a certain prescription * * *" (Then follows the prescription.)

The plaintiff in error moved to quash the indictment (R. pp. 23-24) which motion was overruled (R. pp. 24-26). This is assigned as error on this writ (R. p. 173). Before verdict, the plaintiff in error filed a motion to strike from the record testimony of physicians as to the quantity of the drug prescribed, and charges for prescribing (R. pp. 160-161). This motion was also overruled (R. p. 161) and is covered by the ninth assignment of error (R. pp. 174-175); and an instruction to the jury on the same matter is covered by the third assignment (R. p. 173). Other errors assigned are to the court's instructions to the jury (R. pp. 173-174) and the court's overruling defendant's motion in arrest of judgment (R. p. 174), which motion and opinion are found on pages 166-171 of the record.

After the motion to quash the indictment was overruled, the case came up for hearing on the indictment and evidence

was submitted on both sides. The Government introduced witnesses who testified that the plaintiff in error had given them prescriptions for narcotic drugs; but they all testified that they purchased the drugs elsewhere, and all but one of them testified that plaintiff in error examined them before writing the prescriptions. Their testimony is found in the transcript of record on pages 55 to 115. The Government also put in evidence some prescriptions of the plaintiff in error, all of which had been filled by someone else (R. pp. 27, 39-42, 130-133). There was also testimony, for the Government, of a narcotic inspector who was with one of the other witnesses when he received a prescription (R. pp. 50-55); of a narcotic inspector as to the number of prescriptions written by plaintiff in error and filled by a certain druggist (R. pp. 116-125); of the Collector of Internal Revenue showing that plaintiff in error had registered as required by the Harrison Act (R. p. 130); and of physicians who testified to the standard of practice among physicians in prescribing narcotic drugs (R. pp. 28-50, 126-129, 133-137). The other witnesses were called on behalf of the defense.

None of the witnesses for the Government testified that they had bought the drugs from the plaintiff in error; that any had been bought from him; or that he owned any or had any in his possession. But all the evidence adduced showed that the drugs were bought from someone else. All the witnesses testified that the sales were consummated at a drug store and out of the presence of the plaintiff in error, and it was not contended by the Government that he was in any way interested in the store where the drugs were procured.

After all the evidence was in, and none of it tended to show any sale, barter, exchange, gift, dispensation, or distribution of drugs by plaintiff in error, the trial justice re-

fused to direct a verdict; and, after verdict, he would not arrest judgment, but passed sentence. These errors of the trial court are all pointed out and discussed in the argument, but let us first read the law under which the indictment was drawn.

THE STATUTE.

The indictment was brought under Section 2 of an Act of Congress, approved December 17, 1914, known as the Harrison Anti-Narcotic Act (38 Stats. L. 785; 6 Comp. Stats. 1916, Sec. 6287 G). This section of the Act was inadvertently omitted from the original brief and provides, in terms, as follows:

> "Sec. 2. That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section five of this Act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned. Nothing contained in this section shall apply—

"(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: *Provided*, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this Act.

"(b) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this Act: *Provided, however*, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further*, That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned.

"(c) To the sale, exportation, shipment or delivery of any of the aforesaid drugs by any person within the United States or any Territory or the District of Columbia or any of the insular possessions of the United States to any person in any foreign country, regulating their entry in accordance with such regulations for importation thereof into such foreign country as are prescribed by said country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

"(d) To the sale, barter, exchange, or giving away of any of the aforesaid drugs to any officer of the United States Government or of any State, territorial,

district, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy, the Public Health Service, and for Government, State, territorial, district, county, or municipal or insular hospitals or prisons.

"The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue for sale by them to those persons who shall have registered and paid the special tax as required by section one of this Act in their districts, respectively; and no collector shall sell any of such forms to any persons other than a person who has registered and paid the special tax as required by section one of this Act in his district. The price at which such forms shall be sold by said collectors shall be fixed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, but shall not exceed the sum of $1 per hundred. Every collector shall keep an account of the number of such forms sold by him, the names of the purchasers, and the number of such forms sold to each of such purchasers. Whenever any collector shall sell any of such forms, he shall cause the name of the purchaser thereof to be plainly written or stamped thereon before delivering the same; and no person other than such purchaser shall use any of said forms bearing the name of such purchaser for the purpose of procuring any of the aforesaid drugs, or furnish any of the forms bearing the name of such purchaser to any person with intent thereby to procure the shipment or delivery of any of the aforesaid drugs. It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession.

"The provisions of this Act shall apply to the United States, the District of Columbia, the Territory of

Alaska, the Territory of Hawaii, the insular possessions of the United States, and the Canal Zone. In Porto Rico and the Philippine Islands the administration of this Act, the collection of the said special tax, and the issuance of the order forms specified in section two shall be performed by the appropriate internal revenue officers of those governments, and all revenues collected hereunder in Porto Rico and the Philippine Islands shall accrue intact to the general governments thereof, respectively. The courts of first instance in the Philippine Islands shall possess and exercise jurisdiction in all cases arising under this Act in said islands. The President is authorized and directed to issue such Executive orders as will carry into effect in the Canal Zone the intent and purpose of this Act by providing for the registration and the imposition of a special tax upon all persons in the Canal Zone who produce, import, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations."

ASSIGNMENT OF ERRORS.

The assignment of errors is set out in full in the original brief, pages 6-13, and is found on pages 172-177 of the transcript of record filed in this case.

The first error assigned had to do with the court's refusal to grant defendant's motion to quash the indictment (R. p. 173). The motion to quash (R. p. 23) questioned the constitutionality of the Act and the sufficiency of the indictment.

The second, eleventh, twelfth, thirteenth and fourteenth errors assigned (R. pp. 173, 177) had to do with the sufficiency of the indictment and the evidence.

The third and ninth assignments of error (R. pp. 173, 174) pertained to the court admitting in evidence certain testimony which was immaterial and irrelevant and which tended to unjustly prejudice the jury.

The fourth, fifth, sixth, seventh, and eighth assignments of error (R. pp. 173, 174) were to the court's instructions to the jury.

The tenth assignment (R. p. 175) was in the court's refusal to allow the wife of the defendant to testify.

These errors will be taken up in argument in the manner and order in which they are here grouped in order to avoid the consequent repetition and confusion of considering them separately.

ARGUMENT.

The three chief arguments against the judgment of the lower court are that section 2 of the Harrison Anti-Narcotic Act is unconstitutional; that the indictment, under which the plaintiff in error (defendant below) was convicted, was defective; and that there was not any evidence adduced at the trial which would warrant a conviction under the Harrison Act or any other law of Congress. The constitutionality of the Act has already been considered in detail in the original brief and, in this supplement, the sufficiency of the indictment and of the evidence and errors committed during the trial will be discussed.

At this point, let us outline briefly our contentions, after which they will be taken up under the several assignments of error; and, for this purpose, the Act will be *assumed* to be constitutional and valid.

The Act provides "that it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs," etc. The indictment charged that the defendant did sell, etc., by issuing prescriptions for drugs. Selling a drug and issuing a prescription for it are not the same thing. They are materially different and charges of both are contradictory. Being inconsistent, they are repugnant to each other; and this repugnancy makes the indictment defective, with the result that it should have been quashed.

The Act makes the sale unlawful but does not make any provision against the issuing of a prescription; so, if the charge of selling were alone and unexplained by the charge of issuing prescriptions, the indictment would be good as charging an offense under the statute. But, the repugnancy being present, it can only be disregarded by considering the explanation of the sales as immaterial and, therefore, surplusage. If it is considered as surplusage, it must be disregarded and the indictment stands with the single charge of selling; otherwise, it is repugnant and the whole indictment defective.

Before the trial court, there was not any evidence of a sale of the drug by the defendant, but all evidence adduced was of the issuing of prescriptions by him. If the charge of issuing prescriptions is disregarded as surplusage to save the indictment, the only one left is of selling, and there is a variance between this charge and the proof.

Whichever way the explanatory charge is considered, the conviction of the plaintiff in error fails. If it is considered as material, it is repugnant and fatal, with the result that the indictment is of no effect. If it is considered as immaterial and surplusage, it must be wholly disregarded, and there is a variance between the proof and the remaining charge of the indictment. Under either interpretation, the result is the same because there is nothing to support the conviction.

Now, let us consider these propositions more fully under the several assignments as grouped above.

FIRST ASSIGNMENT OF ERROR.

The first error assigned was that "the court erred in refusing to grant defendant's motion to quash the indictment, which motion was made before plea and before the jury was

sworn in the case" (R. p. 173). The grounds assigned by this motion were as follows (R. pp. 23, 24):

> "First. The so-called Harrison Act under which the indictment is found, is unconstitutional and void.
>
> "Second. It violates the tenth amendment of the Federal Constitution, as to the reserved rights of the State, as said Harrison Act is an attempt to regulate commerce wholly within a State, and to exercise police powers therein on the part of the United States.
>
> "Third. It violates said provisions in attempting to regulate the practice of medicine within the states.
>
> "Fourth. The indictment does not charge the defendant with the commission of any offense against the United States.
>
> "Fifth. The acts of the defendant averred in the indictment are not prohibited by law, nor are they in violation of any law of the United States.
>
> "Sixth. The indictment, as a whole, does not charge the defendant with the commission of any offense prohibited by the so-called Harrison Anti-Narcotic Act or with the commission of an offense prohibited by any other law of the United States."

The constitutionality of the statute was taken up in the original brief and the purpose of this argument is to show that the indictment was defective because it did not charge the defendant with any crime. Therefore, only the last three objections will be considered; and they will be taken up as one.

The indictment charged that defendant did sell, barter, exchange, and give away drugs by issuing prescriptions for them. It charged sales; but, after a videlicet and by way of explanation, it alleged that the sales complained of were merely the issuance of prescriptions. This explanatory clause shows with just what act it was intended to charge the defendant; but the acts made criminal by Section 2 of the Harrison Act were selling, bartering, exchanging, and

giving away narcotic drugs, and, unless the explanatory clause shows a sale, etc., it is an additional charge of a different act.

The acts prohibited by Section 2, under which the indictment was drawn, are selling, bartering, exchanging, or giving away drugs. To sell, to barter, to exchange, or to give away, have different meanings, but it is necessary to all of them that some property pass from one person to another. They are all in such common usage that it seems unnecessary to point out the definitions of the different dictionaries, but the following, taken from the Century Dictionary and Cyclopedia, are substantially the same as those employed by all the lexocographers:

> Sell: "To give up or make over to another for a consideration; transfer ownership or exclusive right of possession in (something) to another for an equivalent; dispose of for something else, especially for money."
>
> Barter: "To give for another of equivalent or supposed equivalent value."
>
> Exchange: "In common, to part with in return for some equivalent. To give and receive reciprocally."
>
> Give away: "To alienate (the title to or property of a thing); make over to another; transfer."

These definitions all show that it is essential that property in the thing sold, bartered, exchanged, or given away be transferred from one person to another. Since this transfer is necessary to all, it will only be necessary to consider one of the verbs because what is true of one, in this regard, is true of the others. For this purpose, let us take the first one—sell.

The statute provides that it is unlawful to sell narcotic drugs. Selling creates a sale. It is not until they are actually sold, that is, when there is a sale, that a criminal act has

been committed, for which a person can be prosecuted under the statute; and there is not a sale until property in the things sold passes from the seller to the buyer. This is very clearly brought out by the following excellent definitions of a sale:

> "A *transmutation of property* from one man to another, in consideration of some price." 2 Blackstone's Comm. 446.
>
> "A *transfer* of the absolute or general *property* in a thing for a price in money." Benjamin on Sales.
>
> "An agreement by which one of two contracting parties, called the seller, gives a thing and *passes the title* to it, in exchange for a certain price in current money, to the other party, who is called the buyer, or purchaser who, on his part, agrees to pay such price." Bouvier's Law Dictionary.
>
> "A *transfer* of property for a fixed price in money or its equivalent." *Iowa* vs. *McFarland*, 110 U. S. 471.

It is the sale for which a person is liable; it is the sale which is criminal; and these definitions show that an actual transfer of the property sold is necessary to its existence. They show that a sale implies a transferring of property from the seller to the buyer, or purchaser, and includes the vesting of the title in the purchaser as well as divesting the seller of it. Thus, a sale can be only to the party who, on the sale and by reason of it, becomes the *owner of the thing sold*.

The Act provides that a person is criminally liable for selling narcotic drugs, which means that he is liable for a sale of those drugs. It is a provision that it is unlawful to transfer drugs to another. We have considered selling only, but the same is true of bartering, exchanging, and giving away because, there also, there must be a transfer of the

property in the subject matter of the barter, exchange, or gift.

Now, the indictment charged that the defendant did sell, etc. Instead of allowing this allegation to stand so that it could be understood to mean that defendant had transferred the property in the drugs, it went on to state that the sales were, in fact, accomplished by issuing prescriptions for drugs and so the questions arise: Does issuing a prescription pass title to the thing prescribed? and, Is issuing a prescription, in reality, a sale, barter, exchange, or gift of the thing prescribed? If not, there are charges of two separate and distinct acts. If prescribing is not selling, bartering, exchanging, or giving away, the explanatory clause negatives them and contradicts the charge of them.

The Century Dictionary and Cyclopedia defines the verb, "to prescribe," as follows:

> "Specifically, to advise, appoint, or designate as a remedy for disease."

The same authority defines a prescription as follows:

> "In medicine, a statement, usually written, of the medicines or remedies to be used by a patient, and the manner of using them."

The Standard Dictionary says that, in medicine, a prescription is:

> "A physician's formula for compounding and administering a medicine."

These definitions will suffice to show that prescribing does not pass or transfer title to the thing prescribed, and that a prescription is merely advice, by which no property in the thing advised to be used passes.

If selling, bartering, exchanging, and giving away, drugs pass title to them and if issuing a prescription for drugs does not pass title to them, then the prescription is not a sale. The indictment alleges that defendant's prescribing was a sale; but, since they are different acts and prescribing is not a part of a sale, it could not be.

Let us consider it from another standpoint. A sale, barter, exchange, or gift, transfers the property and vests it in the purchaser, transferee, or donee. It gives him a vested right—a right *in rem*. A prescription does not vest the thing prescribed in the person to whom issued and he does not acquire a right *in rem*, nor even a right *in personam*, by virtue of it. He has not any rights whatsoever because of it, and to hold that issuing a prescription for drugs is a sale of them is a holding either that a sale does not transfer a vested right or that a prescription vests *the thing prescribed* in the person to whom issued.

A physician usually prescribes things which he does not have in his possession or any right in or title to, but a person can not sell that which is not his, or in his possession. He can not transfer property which is not his and vest it in another; therefore, since the things prescribed by physicians are not their property, they can not pass title to them and, as a consequence, no sale takes place. Prescribing is not selling, etc., and a sale, barter, exchange, or gift does not take place when a prescription is issued.

In *Stephens* vs. *State*, 73 S. W. (Tex. Cr. App.) 1056, it was held that issuing a prescription is not selling. In that case the defendant, a physician, was indicted for prescribing whiskey under a statute which made it unlawful to sell intoxicating liquors except on a prescription of a regular physician; and for a physician to issue a prescription for them except after a personal examination showing the applicant to be sick. The state constitution provided for leg-

islation prohibiting the sale of intoxicants. At the trial, it was not shown that any whiskey was sold because of the prescription.

It was held that, since the constitutional provision allowed only legislation against selling, the statute must be construed to comprehend only prescriptions upon which a sale is consummated because a prescription itself is not a sale. This is well brought out in the following extract from the opinion of the court:

> "The Legislature has no authority to punish a party for giving a prescription to himself. Hawk vs. State, 72 S. W. 842. No more could he be punished for giving a prescription to a third party. The Legislature has not been authorized by our Constitution to prohibit the giving of a prescription. *This is not a sale*, nor can it be tortured into a sale. It may be admitted that it contemplates the purchase of the intoxicant, but it is not a purchase or a sale."

It was also decided in *United States* vs. *Friedman*, 224 Fed. 276, that issuing a prescription for narcotic drugs is not selling, bartering, exchanging, or giving away, the drugs under Section 2 of the Harrison Act.

In *Schaffer* vs. *State*, 8 Ohio St. 642, the court said:

> "The administering of liquors as a medicine, to a patient by a physician could not properly be denominated a sale."

In *Sortwell et al.*, vs. *Hughes*, 22 Fed. Cas., No. 13,177, the plaintiffs were liquor dealers in Massachusetts and the defendant, who sold liquor in New Hampshire without a license, had bought from them, ordering in New Hampshire when one of the plaintiffs happened to be there; but the liquor was shipped by the plaintiffs from Massachusetts.

There was a New Hampshire law prohibiting sales of liquor in that state without a license. Plaintiffs sued the defendant in an action for goods sold and delivered and the defendant set up that the sales were illegal because of the New Hampshire law.

It was held that the defense was not good because the sales took place in Massachusetts and all there was in New Hampshire was a contract to sell. In this connection the court said:

> "But I can not construe a penal statute, which punishes a sale, so broadly, as to hold, that it applies to a mere executory contract of sale. In my judgment, it extends only to executed sales, by which *the property passes from the vendor to the vendee.*"

The rule of construction adopted in that case applies to the case under consideration. The Harrison Act is a penal statute and as such should receive a strict construction. *Francis* vs. *United States*, 188 U. S. 375; *United States* vs. *Harris*, 171 U. S. 305. It is a criminal statute in derogation of the common law and nothing should be added by intendment. Here, as in that case, the act complained of is not prohibited by the statute in express terms. In this case, the prescription might be instrumental in the consummation of a sale, but not any more so than the executory contract in *Sortwell* vs. *Hughes*. The doctrine of that case, that a criminal statute prohibiting selling can be applied only to actual sales where property is transferred, should have been adopted in the adjudication of this case.

It may be argued that it was the intention of Congress to prohibit prescribing as well as selling, etc., but this court has many times decided that nothing can be added to a criminal statute by intendment.

Francis vs. *United States*, *supra*.
United States vs. *Harris*, *supra*.
Elliott vs. *East Penn. Railroad Co.*, 99 U. S. 573.
Tiffany vs. *National Bank of Missouri*, 18 Wall. 409.
United States vs. *Gooding*, 12 Wheat. 460.
United States vs. *Reynolds*, 244 Fed. 991.

It was well known by those who drew up the indictment that the defendant could not be charged with a sale, etc., as provided against in the statute. It was also well known that a simple charge of issuing prescriptions would not be sufficient to sustain a conviction under the statute. But they very cleverly tried to meet the requirements of the statute by alleging that which could not be proved, and to meet the requirements of proof by alleging facts which might be shown. If the charge of a sale had been alone, the indictment would have been good; but it could not have been proved, and the defendant would not have been found guilty. If the charge of issuing prescriptions had been alone, the indictment would not have been sufficient as it would not have charged a crime under the statute. Then, how can a count be made good by the joinder of two charges which, in themselves, are not good? We contend that, in the absence of a statute making the two acts together one crime, this can not be done.

The allegations of prescribing and selling are inconsistent with one another and repugnant, which makes an indictment defective and it should be quashed. This is especially true where the repugnant allegations show a case not criminal. A case very much in point and very aptly stating the law is *State* vs. *Mahan*, 2 Ala. 340. In that case a state statute made it unlawful to bet on elections and Mahan was indicted for betting. An explanatory allegation (like the one of the indictment in the case *sub judice*) showed that the bet was on the result of an election already consummated. A

demurrer to the indictment was sustained on the ground that there was not any charge of an offense under the statute. The court laid down the following rule as basis for the decision:

> "In general, it is sufficient for the indictment to charge the offense in the terms of the statute, but if superfluous allegations are added, and these show a case not within the statute, the several allegations then become repugnant to each other, and the indictment is bad on demurrer. (King vs. Stevens et al., 5 East 244)."

The court said that the allegations were repugnant to the idea that the defendants were guilty under the statute.

In *State* vs. *Lockwood*, 119 Mo. 463, an indictment charged that the defendant wilfully and with culpable negligence killed another. It was held bad for repugnancy and quashed, the court saying:

> "If the killing was 'wilful' as charged in the indictment, then it could not have been accidental, or by 'culpable negligence.' The terms are inconsistent, as they can not both be true."

In *People* vs. *Myers*, 20 Cal. 76, it was held that a count in an indictment for arson alleging that the house burned was the property of one Lemon and the dwelling of one Chinaman, was repugnant and therefore defective.

In *State* vs. *Haven*, 59 Vt. 399, one count in the indictment charged that the defendant caused to be issued a false and fraudulent certificate of stock purporting ownership in stock, and of such tenor, and then went on to allege that the certificate was signed in blank. It was held that the allegations were repugnant and therefore the count was de-

fective, because a blank certificate can not purport ownership nor have a tenor as alleged.

Another count charged that the defendant signed a certain false and fraudulent certificate of stock with the intent that it should be issued and used, which certificate had been signed in blank and was issued. This was held bad for duplicity because signing was one act and issuing was another.

The case of *United States* vs. *Dow*, 25 Fed. Cas., No. 14,990, was on an indictment for murder. The first count alleged that the defendant "late of the District of Maryland, mariner, on the 31st day of October, 1839, then and there, being on board a certain brig called the Francis, belonging to a citizen of the United States, on the high seas, on the Atlantic Ocean, in latitude thirty-three" out of the jurisdiction of any particular state, and within the jurisdiction of the United States, did *then and there* commit the crime charged. There was a verdict of guilty and judgment was arrested. It was held that the words "then and there" must be taken to mean the 31st of October, 1839, in the District of Maryland as they are the only time and place mentioned and which could have been referred to; and, this being the case, it is repugnant to the allegation, in the same clause, that he committed the crime "out of the jurisdiction of any particular state." The following quotations from the opinion show the basis of the decision arresting the judgment, and the attitude of the court.

> "We have no jurisdiction unless the offense was committed out of the jurisdiction of any particular state. The allegations as to place are, therefore, both material; they are repugnant to one another; and, as neither can be rejected, the indictment is fatally defective."
>
> "The rules of law applicable to indictments, are un-

> doubtedly in many instances technical and nice; but they have been long and well established, and no court has a right to disregard them, even in the case of the humblest individual, or the most guilty offender."

In *State* vs. *Judd*, 221 Mo. 554, an information charged the defendant, Judd, with feloniously registering as a voter under a name not his own, to-wit, the name of Chas. Cohn, in violation of a state law, which he did by telling the election officers his name was Chas. Cohn and they entered his name as such at his request. It then went on to aver that defendant signed under the name of Chas. Cohn by writing on the books the name *Chas. Cohen*. It was held that the averments were repugnant as it is inconsistent to state that he signed one name after stating he bore another; and, since the demurrer was not sustained as it should have been, the objection, being a fatal one, was available on appeal.

These cases all show the effect of inconsistent and repugnant allegations in an indictment. They show that such repugnant averments as were in the indictment under which the plaintiff in error (defendant below) was prosecuted, make it defective and it should be quashed. If both averments are considered, the explanatory one contradicts the one explained and destroys the validity of the indictment. The only way in which one of them could be disregarded would be by considering it to be so immaterial as to amount to surplusage. In that case, the explanatory averment would have to be considered the surplus one because the other is the main charge and the only allegation of a crime under the statute. But not all surplusage can be disregarded.

Immaterial allegations which are not necessary to the charge may be rejected as surplusage; but, where they negative the charge, they can not be, and they are fatal to the count. This is a fundamental rule of our criminal law and

has been strictly adhered to both in England and America. The two following extracts from Comyn's Digest very aptly express the rule and show why the count is faulty:

> "An indictment is insufficient, whenever all the facts charged may be true, and yet the party be innocent." Indictment H.
>
> "Yet, if a man by the allegation of a thing not necessary shews that he had no cause of action, this, tho' surplusage, shall hurt." Pleader, c. 29.

It is also well stated by Mr. Justice Story in *United States* vs. *Howard*, 3 Sumner 12, as follows:

> "But no allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment can ever be rejected as surplusage."

The above extracts show that the early American authorities, as well as the English, considered an indictment defective where it showed that no prosecution was maintainable; and that an averment which negatives a good charge can not be rejected as surplusage. The same doctrine is in effect to day. It is stated, with supporting cases, in 2 Bishop's New Criminal Procedure, Sec. 482, as follows:

> "The doctrine is, that unnecessary matter, of a sort or so averred as to negative the offense meant, or otherwise to show the prosecution not maintainable, can not be rejected as surplusage."

In *People* vs. *Myers*, *supra*, it was urged at the trial that the repugnant allegation could be rejected as surplusage; but the upper court held that it could not, quoting the above extract from the opinion of Mr. Justice Story in *United States* vs. *Howard*, *supra*.

In *Dukes* vs. *State*, 11 Ind. 557, the defendant was indicted for murder and the second count charged that he did feloniously and unlawfully, without malice, kill and murder another voluntarily. This count was held bad as not charging any indictable homicide because it negatived the malice essential for first or second degree murder, and averred that it was done voluntarily which prevented it being manslaughter. In this regard, the court said:

> "It charges an act mentally, morally, and legally impossible to be performed by a 'person of sound mind,' viz., the voluntarily, without malice, in the absence of passion or excitement, and in no attempt to commit an unlawful act, unlawfully killing a human being."

These cases which are analogous to the case under consideration, illustrate the effect of an inconsistent allegation which negatives the principle charge and point out the result of an indictment showing that no criminal act has actually been committed. But it is not necessary to deal in analogies because the question raised here has been decided by the Federal courts in *United States* vs. *Friedman*, 224 Fed. 276, and *United States* vs. *Reynolds*, 224 Fed. 991.

In the *Friedman* case, the defendant was indicted under Section 2 of the Harrison Act for the same, or similar, acts as those which it was intended to prove against plaintiff in error. This is shown by the following statement of the facts by the court:

> "The indictment in this case charges the defendant with having dispensed, distributed, and prescribed gum opium and powdered opium, the derivatives, compounds, and preparations thereof, to-wit, morphine sulphate, heroin and cocaine, a derivative of coca leaves, without the dispensing, distribution and prescription as aforesaid being in the course of his professional practice; that is to say, that he dispensed, dis-

> tributed, and prescribed the aforesaid drugs in quantities more than those necessary to meet the immediate needs of a patient, and did not distribute, dispense, and prescribe the drugs in good faith and as a medicine."

The defendant demurred to the indictment and his demurrer was sustained because there was not a charge of a crime within the Harrison Anti-Narcotic Act. In sustaining the demurrer, the court said:

> "* * * he is indicted for giving a prescription for said drugs * * *.
>
> "I fail to find in the Act of Congress under examination any language making the doing of the things with which the defendant is charged a violation of law."

In the *Reynolds* case, the defendant, Reynolds, was indicted for dispensing opium in violation of Section 2 of the Harrison Act, by issuing prescriptions for it. The court held that this was not a criminal act within the terms of the statute. In regard to this, it was said:

> "The Harrison law requires nothing of physicians issuing prescriptions for opium save that they (be registered and sign and date the prescriptions). By giving a prescription, the physician does not 'dispense' opium, in the sense of the word as used in the said law. As defendant is not charged with having failed to so register or to so sign the prescription, he is not accused of any offense or violation of said law."
>
> "Defendant, charged with giving a prescription for and so dispensing pounds of opium, is not charged with any offense known to the law."

Those two Federal cases are identical with the case now under discussion and the same principle should apply in all. The averment that the sales were made by issuing prescriptions clearly shows that no offense under the statute was

actually committed, and the indictment should have been quashed; and, since it was not, the conviction should be set aside on this writ of error.

SECOND, ELEVENTH, TWELFTH, THIRTEENTH, AND FOURTEENTH ASSIGNMENTS OF ERROR.

These assignments have to do with the sufficiency of the indictment and the evidence introduced at the trial to sustain a conviction. There was not any evidence of a sale, etc., offered and, therefore, the court should have directed a verdict for the defendant. The second error assigned (R. p. 173) was that the court refused to instruct the jury as follows:

> "Under the law and the evidence the verdict must be not guilty in the case at No. 89 November Term, 1917."

The other errors assigned were as follows:

> "Eleventh. The learned Court erred in each and every particular of its general charge to the jury in this; to wit, That the Court should have withdrawn the issues from the jury and directed a verdict for the defendant." (R. p. 177.)

> "Twelfth. The learned Court erred in refusing to grant defendant's motion in arrest of judgment." (R. p. 177.)

> "Thirteenth. The learned Court erred in overruling motion made by defendant in arrest of judgment." (R. p. 177.)

> "Fourteenth. The learned Court erred in pronouncing judgment after motion made in arrest of judgment." (R. p. 177.)

The motion in arrest of judgment was made on the grounds that the Harrison Anti-Narcotic Act is unconstitutional; that the indictment does not charge the defendant with the commission of any offense prohibited by the Act; and that there was no competent evidence to sustain the verdict of the jury. (R. p. 166.)

The constitutionality of the Act was taken up in the original brief, and the insufficiency of the indictment was discussed under the first assignment of error; therefore, it will be necessary to consider only the evidence, under these assignments.

As already pointed out, the indictment charged two separate and distinct acts which are repugnant. If they are both allowed to stand on the ground that they are both material, the indictment is defective and would not sustain a conviction. The only way in which this inconsistency—repugnancy—can be disregarded is by considering the explanatory clause as surplusage; and, if this is done, it is the same as not in the indictment. If this court thinks that the allegation is so immaterial as to be surplusage, it must be rejected, and the indictment can be considered as only charging the defendant with selling, bartering, exchanging, and giving away the drugs.

Considering this as surplusage and stricken from the indictment, let us consider the evidence before the trial court and see if it was competent to sustain a conviction on the remaining charge of selling, etc. The evidence is all set out in the transcript of record, pages 26-165. There is testimony of five addicts to the effect that they procured prescriptions from the defendant; but they also testified that they did not receive the drug from him, but had to go to a drug store to get it. Their testimony is found on the following pages of the record: 55 to 80; 81 to 84; 85 to 107; 107 to 110; and 110 to 115. Their testimony is only that the defendant issued prescriptions for drugs. There was

also the testimony of a narcotic inspector that he was with one of the addicts when he procured a prescription from the defendant and bought the morphine prescribed at a drug store (R. pp. 50-55).

There was also testimony of a narcotic inspector who testified to defendant's prescriptions which had been filled at a drug store (R. pp. 26, 27 and 116-125); that of the Collector of Internal Revenue showing that defendant was registered as required by the Harrison Act (R. p. 130); that of physicians who testified for the Government concerning the treatment of drug addicts to effect a cure, and the standard of practice among physicians in prescribing drugs (R. pp. 28-50, 126-129, and 133-137); and various prescriptions for drugs issued by defendant were offered in evidence (R. pp. 39-42 and 130-133). This is all the evidence shown by the record as offered by the Government. There was not any evidence that defendant had any drugs in his possession at any time, that he sold any or gave any away, nor that anyone ever procured any from him. It all tended to prove only that he had issued prescriptions.

As already pointed out, issuing a prescription is not selling, bartering, exchanging or giving away that which is prescribed; therefore, the evidence, which tended to prove the former only, would not support a conviction on the latter. With only such as was put in evidence at the trial the defendant could not be convicted and the jury should have been so instructed; but they were instructed that, as a matter of law, the defendant would be liable for issuing prescriptions for drugs. See the sixth and eighth assignments of error (R. p. 171) hereinafter discussed in this brief.

The statute provides against selling, bartering, exchanging and giving away drugs and, if we consider the explanation of defendant's sale in the indictment as surplusage, the charge is that he did sell, etc. But the proof is at variance

with the charge as it is of a different act not related to a sale. Such a variance precludes a conviction, and, the jury finding a verdict of guilty, the court should have given judgment for the defendant *non obstante veredicto*, or defendant's motion in arrest of judgment should have been granted.

Where the indictment charges one act and the evidence proves another; that is, where there is a variance between the allegations and the proof, it is fatal. It is of the substance; and, as a matter of law, a conviction on the charge can not be sustained on the proof where there is such a variance between them. In such a case, the jury should be instructed to find the defendant not guilty; and, even after a verdict of guilty and notwithstanding it, the court should pronounce for the defendant or arrest judgment. This is well brought out in a number of cases of which the following are good examples.

In *Burton* vs. *United States*, 196 U. S. 283, the indictment charged that the defendant received money in St. Louis and the proof showed that a check was sent to Washington for him and taken by him to the Riggs Bank, which bank credited his account with the amount and forwarded the check to the St. Louis Bank on which it was drawn. It was held that such proof could not sustain a conviction on the indictment, the court saying:

> "The only liability of defendant was on his indorsement. All this made a payment at Washington, and as a result there was a total lack of evidence to sustain the sixth, seventh, eighth, and ninth counts of the indictment. The court should have, therefore, directed a verdict of not guilty on those counts."

In *Williams* vs. *State*, 107 Ga. 693, the defendant was indicted for selling liquor. One count charged a sale and another charged a contract to sell. At the trial, the evidence showed that he had been requested to get the liquor for

others who had given him the money to pay for it. It was held, on appeal from a conviction, that he was the agent of the purchasers and not a seller at all, and, therefore, the conviction could not stand as a verdict of guilty was contrary to the evidence.

In *Commonwealth* vs. *Packard*, 71 Mass. (5 Gray) 101, the defendant was indicted for selling liquor. The only witness for the prosecution was one man who had received a drink of brandy from the defendant, but he testified that the defendant would not accept any pay for it. The trial court refused to instruct the jury that there was no evidence to support a verdict of guilty; but, on appeal from a conviction, the judgment was reversed on the ground that there was no evidence which ought to have been left to the jury.

In *State* vs. *Judd*, *supra*, the information alleged that the defendant signed the registration book with the name Chas. Cohn and the witnesses for the prosecution negatived any signing of the name by the defendant. This was held a fatal variance between the allegation and proof and the conviction of the defendant was not allowed to stand.

In the case *sub judice* there is a similar variance between the charge and the proof. It has already been pointed out that the only evidence was of prescriptions, and such proof does not show a sale, barter, exchange, or gift. Nor does it show that drugs were dispensed or distributed. *United States* vs. *Friedman*, 224 Fed. 276; *United States* vs. *Reynolds*, 244 U. S. 991. (Dispensing and distributing are taken up in this brief under the next assignment.)

This variance is fatal and will not support a conviction. When the evidence was all in and it became apparent that no unlawful act under the statute had been proved, the court should have so informed the jury and directed a verdict for the defendant. The court refused to do this, and even went so far as to instruct the jury that, *as a matter of law*, the issuance of prescriptions for narcotic drugs by the

defendant would make him guilty under the indictment and the statute, and that they could so find (charges covered by the sixth and eighth assignments of error, R. p. 174). Even after verdict, the judgment should have been arrested, but the court refused defendant's motion and pronounced judgment on the verdict. This variance goes to the very substance of the action and, as a consequence, the judgment should be reversed on this writ of error.

THIRD AND NINTH ASSIGNMENTS OF ERROR.

The third assignment of error (R. p. 173) was to the court's instruction to the jury. The defendant requested the court to instruct the jury as follows:

> "Eleventh. The Act of Congress under which the indictments are drawn does not limit the amount of morphine sulphate which a physician may prescribe to his patient neither does said act limit the amount of money the physician may charge his patient for writing the prescription."

The court did so inform the jury, but instructed them that they might consider the amount prescribed and the charge therefor, in the following instruction:

> "The Act of Congress does not undertake to limit the morphine sulphate which a physician may prescribe for his patient, nor the amount of his charge therefor, but, if the physician seeks protection under Exception (a) as against the requirements of Section 2, it must appear that drugs were dispensed by him to a patient in the course of his professional practice only. And the amount of drugs so prescribed, and the charge therefor, may throw light on the question whether the drugs were in fact administered by the physician in good faith in the course of his professional practice only."

The ninth error assigned (R. pp. 174-175) was in the court refusing defendant's motion to strike from the record certain testimony of physicians and druggists (R. pp. 160, 161) concerning the amount of the drug prescribed by the defendant; the proper amount prescribed by a physician that a druggist would or should fill; the proper amount for a physician to prescribe; the proper charges of a physician for writing prescriptions and examining patients; and the proper charges of druggists for filling prescriptions. In overruling this motion to strike, the court said (R. p. 161), as ground for its action:

> "It being clear, under the provisions of the Harrison Anti-Narcotic Act, that none of the drugs in question may be imported, manufactured, sold, dealt in, distributed, or even given away, except for medicinal purposes, the motion to strike out is overruled."

Both of these assignments go to the admissibility of such evidence and the error of the court in allowing and instructing the jury to consider it.

None of this evidence is material or relevant as it does not tend to prove a sale or any other offense under the statute. The Harrison Act does not make any provision limiting the charge for a prescription or the amount prescribed.

Up until the time this testimony was offered, there had not been any evidence of a sale, bartering, or exchange and no evidence introduced which would make it relevant. Nor was there any evidence of a sale subsequently introduced. It not being evidence of a sale and no proof of a sale having been offered, it was immaterial. Until a sale was proved or evidence tending to prove one had been introduced, it was not competent; that is, it was not competent to try to show bad faith in the doing of an act which was not done.

The trial court, in refusing defendant's motion to strike out, very carefully avoided any reference to the relevancy of the testimony (R. p. 161). In its instruction to the jury, which was the occasion of the third assignment of error (R. p. 173), the court allowed the jury to consider it as tending to show bad faith in a sale which had not been proved. It was in fact, an instruction to consider the testimony as evidence of bad faith in the consummation of a non-existent act.

Such an instruction is clearly erroneous as the testimony can serve no other purpose than to prejudice the minds of the jury. In that instruction, the court said that the amount of drugs and the charge therefor "may throw light on the question whether the drugs were in fact administered by the physician in good faith in the course of his professional practice only." By it the court recognized the existence of that which was non-existent. It was the same as telling the jury to find that a sale had been made and that they could determine whether it was made bona fide or mala fide.

The defendant did not need to seek protection under Exception (a) as suggested by the court to the jury, because no sale, barter, exchange, or gift had been proved. That exception provides that the prohibition in Section 2 against selling, bartering, exchanging, or giving away drugs, shall not apply to "the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only." But it was not shown that defendant did dispense or distribute any of the drugs, and he did not need to defend on the ground that it was done in his professional practice only. The court tried to charge him with a defense which he had not undertaken and, by so doing, made it appear that he had admitted the dispensing and distribution of the drugs. The defendant denied that he had dispensed or distributed "any of the aforesaid

drugs," but the court took it for granted that he had and so instructed the jury.

The Century Dictionary and Cyclopedia defines the transitive verb "to dispense" as follows:

> "To deal or divide out; give forth diffusively, or in some general way; practice distribution of; as, the sun *dispenses* heat and light; to *dispense* charity, medicines, etc."

The same authority defines distribution as follows:

> "The act of dividing or parceling out; allotment in shares or according to requirement; apportionment; division among several."

These definitions will suffice to show that, in either, the thing dispensed or distributed passes from the dispensor or distributor to others. The exception to Section 2 of the Harrison Act provides that the prohibition shall not apply to "the dispensing or distribution of any of the aforesaid drugs," which means that it shall not apply where the drugs themselves are *dealt, divided, or parceled out.* Section 2 does not provide against writing prescriptions and this being an exception to that section, can not be construed to refer to prescribing, either.

In *United States* vs. *Reynolds*, 244 Fed. 991, the defendant, Reynolds, was indicted for giving a prescription for, and so dispensing, opium. It was the same charge as was made against plaintiff in error. The court held that there was not a charge of any offense known to the law because issuing a prescription for opium is not dispensing it, as meant by Exception (a) to Section 2 of the Harrison Act. In this connection, the court said:

> "The Harrison Law (Act of Dec. 17, 1914,) requires nothing of physicians issuing prescriptions for

> opium save that they, the physicians, be registered and the prescriptions be signed by the physician and dated as of the day of such signing. By giving a prescription, the physician does not 'dispense' opium, in the sense of the word as used in the said law. As therein used, 'dispense' relates to actual delivery of the drug by the physician to the patient, from the former's office supply, generally, though not excluding other actual delivery."

That decision stands for the proposition that prescribing is not dispensing or distributing. To the same effect is *United States* vs. *Friedman*, 224 Fed. 276.

Those cases also show that the Harrison Act can not be construed to limit the amount of drugs that a physician can prescribe. In the *Reynolds* case, the court said:

> "In said law is nothing prescribing quantities or forbidding prescriptions for the drug in any quantity. Any attempt to find it therein by construction or implication, does violence to that elementary principle that, when Legislatures undertake to create offenses, it must be by language clear and definite, making it obvious to ordinary intelligence that by certain conduct an offense, and the offense denounced by the statute, is committed. See U. S. vs. May, 241 U. S. 394; U. S. vs. Friedman (D. C.), 224 Fed. 276."

And in the *Friedman* case, the court interpreted the statute in the same way, saying:

> " * * * there is no limit fixed to the amount of said drugs that a physician may prescribe, nor is there any duty imposed upon him, other than to keep a record of all such drugs dispensed by him, and the name and address of the patient, except those to whom he may personally administer, and that he must preserve the records for a period of two years. For failing to do either of these things he is not indicted."

This being the law, the instruction requested, the refusal to grant which is assigned as the third error, should have been given to the jury; and they should never been told to consider the amount as was done in the instruction which was given instead of that request.

FOURTH ASSIGNMENT OF ERROR.

The fourth assignment of error (R. p. 173) was that the trial court refused to charge the jury that,

> "Before there can be a conviction of Jin Fuey Moy on the indictment at No. 89, November Term, 1917, the jury must find from the evidence, beyond a reasonable doubt, that said defendant, Jin Fuey Moy, did unlawfully, wilfully, knowingly and feloniously, sell, barter, exchange, or give away some of the morphine sulphate to one or more of the persons named in said indictment."

Instead, the court did instruct the jury as follows:

> "While the indictment charged the sales and dispensing of the drugs were feloniously made, if the jury are satisfied beyond a reasonable doubt that they were wilfully and knowingly so bartered, exchanged or given away by the defendants, in violation of Section 2, as charged in the indictment, the defendants would be guilty."

The instruction requested shows that, for a conviction, the defendant must be found guilty of an offense made criminal by the Harrison Act; while the actual charge to the jury was that he could be found guilty of a crime if his acts were covered by the indictment. Acts are made unlawful by statutory law and not by indictments, and the fact that any act is charged in an indictment does not make it criminal so as to sustain a conviction if it is not criminal by common law or made so by statute.

The indictment charged that defendant sold drugs by issuing prescriptions for them and the court charged the jury that, if they were satisfied that they were "bartered, exchanged, or given away * * * as charged in the indictment," the defendant would be guilty. As already pointed out, the issuing of a prescription for drugs is not a selling, bartering, exchanging, or giving away of the drugs and is not made a crime against the United States; but, this instruction is a direction to the jury that it is a sale and leaving to them only the question of defendant's *bona fides*.

If the charge had been that they should determine whether or not there was a sale and how it was made, then it would be proper. But it was a charge that they could find him criminally liable for an act which was not criminal and the verdict of the jury, being upon such an instruction, must be considered erroneous.

FIFTH AND SEVENTH ASSIGNMENTS OF ERROR.

The fifth error assigned (R. p. 173) was that the court refused to charge the jury as follows:

> "If the jury find from the evidence that each of the prescriptions mentioned in the indictment at No. 89, November Term, 1917, were written by Dr. Jin Fuey Moy, in his office, on the several dates mentioned in said indictment, that the person for whom each prescription was written came to his office and stated that he was addicted to the use of the drug, giving the amount used, etc., and if before writing the prescription the doctor examined each patient after which he wrote the prescription with instructions as to how to use it, and believing that it would be used by the patient, then the offense charged in the indictment was not committed and the verdict must be not guilty."

The Harrison Act expressly provides that it is not to apply "to the dispensing or distribution of any of the aforesaid drugs to a patient by a physician * * * registered

under this Act in the course of his professional practice." The prayer merely requested the court to instruct the jury that, if they found that the defendant did issue the prescriptions mentioned in the indictment in the course of his professional practice, he would not be guilty under the Act. This was a proper instruction in view of the attitude of the court in overruling defendant's motion to strike out the testimony of the physicians and considering the issuing of a prescription as dispensing the drug, because the jury could not find a person guilty for an act which was not criminal and which a statute provided would not be criminal.

In place of granting the above prayer of defendant, the court instructed the jury as follows, which instruction was the seventh error assigned (R. p. 174):

> "You are to determine, gentlemen, from all the facts and circumstances, from the testimony of the Government and from that offered on the part of the defense, whether Dr. Moy dispensed narcotic drugs only to patients in the course of his professional practice, or whether he made a business of dispensing the drugs to the public generally as they were called for, merely seeking shelter behind the prescription which he issued. You have a right to consider the number of persons to whom he prescribed; whether they were known to him or were strangers; the character of the examinations, if any, which he made before prescribing; the number of prescriptions issued and the amounts prescribed to any individual at one time; whether he was endeavoring in good faith to treat them for the purpose of alleviating suffering or effecting a cure; or was making merchandise of narcotic drugs, feeding the depraved appetite of addicts without reference to their mental and physical welfare, or any ultimate cure to be effected."

That reads more like argument of the prosecuting attorney than an instruction to the jury. Could counsel argue to influence the jury more effectively than did the court when

he told them to determine if the defendant "was making merchandise of narcotic drugs, feeding the depraved appetite of addicts without reference to their mental and physical welfare?" Could such language do other than tend to prejudice the jury against the defendant? Is it consistent with the fundamental right of the accused to be presumed innocent until proved guilty? We contend that it is not and that it was prejudicial to the plaintiff in error.

The jury was told to determine "whether he made a business of dispensing the drugs * * * merely seeking shelter behind the prescription which he issued." This was a direction to them to find him guilty if, in their minds, a crime had been accomplished and an act of his, not wrongful in itself because not prohibited by any law, had, in some degree, been instrumental in its accomplishment. The Act does not provide against issuing prescriptions, but the court directed the jury to find the defendant guilty if they thought he did acts which had the bad effects that the statute was intended to prohibit. The court nor the jury can not go behind the statute and determine what was the intention of Congress in enacting it and decide that any person is guilty of an offense merely because they *think* that what he actually did do was to avoid the statute if the acts which he did were not prohibited and made criminal by the statute itself. It is a fundamental rule of law that criminal statutes are to be strictly construed; nothing is to be added to them by intendment. This was pointed out and authorities cited in the discussion of the first assignment of error. The principle of construction in this regard is very well stated in the opinion of this court in *United States* vs. *Harris*, 171 U. S. 305, in the following language:

> "It may be conceded that it was the intention of Congress to subject receivers of railroad companies, appointed such by courts of the United States, to the

> valid laws and regulations of the states and of the United States, whose object is to promote the safety, comfort, and convenience of the traveling public. But we are not now concerned with the general intention of Congress, but with its special intention, manifested in the enactments under which this suit is brought. * * * Can we fairly bring receivers within the penal clause by reasoning from a supposed or an apparent motive in Congress in passing the act?
>
> "Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the class of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

This opinion shows the law to be that the intention must be found in the language used. The Harrison Act (in the words of this court in *United States* vs. *Moy, supra*) "calls itself a registration and taxing act," and so must be considered as having been enacted for the purpose of raising revenue. Yet, the court instucted the jury that they could find the defendant guilty of selling if they believed he had merely issued prescriptions as a shelter, which instruction allowed them to find an intention to prohibit acts irrespective of their relation to the raising of revenue.

SIXTH AND EIGHTH ASSIGNMENTS OF ERROR.

The sixth and eighth assignments of error (R. p. 174) were to the general charge of the court to the jury as follows:

> "Now, I say to you, as a matter of law that a physician, under this Act, can not dispense any of these narcotic drugs except to a patient; that is, to one who is the subject of medical or surgical treatment; the drugs being dispensed to such patient by the physician for medicinal purposes, in alleviating suffering or endeavoring to effect a cure. *And a physician who prescribes such narcotic drugs* to one not a patient *violates the law.* Or, if he dispenses or distributes such drug in any way except in the course of his professional practice only, he is guilty of a violation of the Act in question."
>
> "*If you find that he was prescribing narcotic drugs* not in good faith and with an honest purpose to comply with the law, but was dispensed to the public generally as they were applied for, not in the course of his professional practice only, *then he would be guilty under this indictment.* He would not be entitled to the benefit of the exception under which he defends, because of his violation of its conditions, and would therefore be liable for a violation of Section 2, under which the indictment is drawn, of selling or dispensing such drugs without a written order from the purchaser, on order forms designated by the Act."

In both these instructions, the court said that the defendant would be guilty under the indictment, *as a matter of law*, if he prescribed for drugs in a given manner. It has already been pointed out that the Harrison Act does not provide against the issuing of prescriptions for drugs and that such prescribing is not a sale, bartering, dispensing, or exchange of, the drugs themselves. This being the case, it

is reversible error for the court to have so instructed the jury.

It is right for the court to interpret the law for the jury; but a verdict of the jury based upon an erroneous interpretation should be set aside, because it is without foundation. If the act of which the accused was found guilty was not a crime, a sentence upon the verdict should not be allowed to stand. Here the verdict was based upon the jury's understanding that, *as a matter of law*, the Harrison Act made it criminal for a physician to issue a prescription for narcotic drugs. This is a matter of substance and not form, and such matters are not cured by verdict. *United States* vs. *Hess*, 124 U. S. 483. A verdict can not stand, but will be set aside on appeal or writ of error, where it was based upon an erroneous understanding of the law and unsupported by the evidence. *Dukes* vs. *State, supra; Williams* vs. *State, supra; Commonwealth* vs. *Packard, supra.*

TENTH ASSIGNMENT OF ERROR.

This error (R. pp. 175-177) was in the court refusing to allow the wife of plaintiff in error to contradict the testimony of certain witnesses for the prosecution. They had testified to what transpired in her presence and she would be a competent witness to dispute them.

She was not offered as a witness on behalf of her husband; that is, to prove his innocence. Her testimony was merely offered for the purpose of showing the falseness of evidence offered by the Government. There seems no good reason for considering her incompetent for this purpose.

CONSTITUTIONALITY.

Now, let us consider briefly the constitutionality of Section 2 of the Act, not from the standpoint of the words

used, but in view of the construction put upon it by the trial court. The original brief considered it from the standpoint of the words used, *assuming* that plaintiff in error had sold some drugs instead of merely prescribing for them. Now, let us consider the constitutionality of that section as it was interpreted by the court.

The Harrison Act was enacted under the power delegated to Congress "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." Constitution, Article 1, Section 8. The trial court held that Congress had authority to enact legislation prohibiting a physician duly registered by a state from writing a prescription within that state, and that the Harrison Act so provided. We have already shown that the Act did not provide against such and contend that no authority was delegated to Congress to so regulate the practice of physicians within the several states.

The Act is a revenue measure (*United States* vs. *Doremus*, 249 U. S. 86), but controlling the practice of physicians in making prescriptions is not even incidental to the collection of revenue. In *United States* vs. *Doremus*, decided March 3, 1919, this court said that the decisive question in determining the full power of Congress in enacting this law, is: "Have the provisions in question any relation to the raising of revenue?" In *United States* vs. *Doremus*, this court said that the ends in view in the enacting of this law must "be reached only through a revenue measure and within the limits of a revenue measure." Prescriptions do not interfere with the collection of the revenue and do not affect the thing taxed as they do not, in themselves, have any interest in, or transfer, the drug; and such legislation is merely the regulation of the practice of medicine, which is a state matter. *Moffett* vs. *Packer*, 193 U. S. [illegible].

It should be remembered in this connection that the act of selling narcotic drugs is made a felony by the statute, and plaintiff in error was indicted as a principal and not as an accessory (R. pp. 3-22).

CONCLUSION.

The indictment charged that the plaintiff in error sold by issuing prescriptions, thereby showing that there was no criminal liability. The evidence adduced at the trial only tended to show that he had issued prescriptions and nothing tended to prove that he had actually sold, bartered, exchanged, given away, dispensed, or distributed any of the drugs. There was no evidence which should properly have gone to the jury. And, aside from these objections, it is beyond the power of Congress to regulate the practice of medicine within the states and prohibit the writing of prescriptions by physicians and any Federal statute seeking to do so would be unconstitutional.

In view of these objections to the judgment of the trial court, it is respectfully submitted that the conviction be set aside and the indictment quashed.

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No. 44.

In the Supreme Court of the United States.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

The plaintiff in error was convicted in the District Court of violating the Harrison Antinarcotic Act (38 Stat., secs. III, c. 1, p. 785).

He was charged in 20 counts of the indictment with 20 unlawful sales of morphine. He was convicted on eight counts and sentenced to two years imprisonment and to pay a fine of $1,000.

STATUTE INVOLVED

The indictment was based on section 2 of the act, the pertinent parts of which are as follows:

> That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by

> the Commissioner of Internal Revenue. * * * Nothing contained in this section shall apply—
>
> (*a*) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice only: *Provided*, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; * * *.

Other provisions of the act bring within this section the drug known as morphine sulphate and provide for the registering and licensing of physicians, dentists, or veterinary surgeons.

THE INDICTMENT.

All of the counts of the indictment are in exactly the same form, the only difference being in the quantity of the drug sold and the name of the person to whom sold. Taking the second count as an example, each count charges that on a certain day Jin Fuey Moy—

> was a practicing physician, and at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully, willfully, knowingly and feloniously sell, barter, exchange and give away derivatives and salts of opium, to wit, eight

drams of morphine sulphate, to one Joe Lewis, alias Henry McKnight, not in pursuance of a written order from the said Joe Lewis, alias Henry McKnight, on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States, under the provisions of section 2 of an act of Congress approved December 17, 1914, and known as the Harrison Antinarcotic Act, that is to say, that at the time and place aforesaid, he, the said Jin Fuey Moy, did unlawfully, willfully, knowingly and feloniously sell, barter, exchange, give away, dispense and distribute to Joe Lewis, alias Henry McKnight, eight drams of morphine sulphate, in manner following, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said Joe Lewis, alias Henry McKnight, a certain prescription, a copy of which is as follows: * * *.

The prescription is then copied and the count continues:

and the said Joe Lewis, alias Henry McKnight, was not then and there a patient of said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America. (Rec., pp. 3–22).

It may be noted that the second and third counts charge sales to the same person—8 drams, or 480 grains, on March 25, and 12 drams, or 720 grains,

on the following April 28. (Rec., pp. 4–5.) Counts 4, 5, 6, and 7 all charge sales to one man—12 drams, or 720 grains, on March 30; 16 drams, or 960 grains on April 6; 16 drams, or 960 grains, on April 16, and 14 drams, or 840 grains, on May 8. (Rec., 6–9.) The tenth and eleventh counts charge sales to one man—16 drams, or 960 grains, on April 6, and 12 drams, or 720 grains, on April 27. (Rec., pp. 12–13.) These are the eight counts on which the plaintiff in error was convicted.

THE FACTS.

There is no serious controversy about the facts, and plaintiff in error did not take the stand to dispute them. He was a physician at Pittsburgh, and was duly registered under the Harrison Antinarcotic Act so as to be authorized to dispense or distribute morphine to a patient "in the course of his professional practice only"; that he issued indiscriminately prescriptions for morphine to all persons who desired them, regardless of whether they were his patients or not, is beyond doubt; that he was in this business was evidently well known, for people came to him from various places outside of Pittsburgh and outside of the State of Pennsylvania and obtained prescriptions. In some cases he went through the form of examining the eyes and making a superficial examination of the heart and lungs, but in other cases there was no pretense of an examination. His office was the resort of drug addicts and of those who desired morphine in large quantities. The

picture is by no means overdrawn by District Judge Thomson, in overruling a motion in arrest of judgment, when he said:

> The defendant seems to have obtained an extended and unenviable reputation as a dispenser of morphine sulphate. From Brooklyn to Chicago, from all the Lake cities, the victims of the drug habit came to Dr. Moy and procured the drugs. When we remember that the testimony showed that morphine sulphate is at least eight times as powerful and deadly as opium; that one-half grain is a large dose and a grain a fatal dose to the non-user; that there are sixty grains in one dram, and that the defendant time and again issued prescriptions for as much as sixteen drams to one person, or 960 grains, enough to kill an entire regiment; that he issued in the two years preceding the indictment, 11,687 prescriptions calling for 15,796 drams, and in addition 43,200 one-half grain morphine tablets and 30,600 one-quarter grain tablets, we can have some conception of the magnitude of the defendant's unlawful business in the distribution of narcotics. And when we consider that for every dram prescribed he received one dollar. the commercial feature of the unlawful business becomes painfully and alarmingly apparent. (Rec., pp. 170–171.)

All the prescriptions mentioned by Judge Thomson were filled at one drug store. Persons calling at that drug store for morphine were sent to Dr. Moy for a prescription. Persons to whom he gave pre-

scriptions were sent by him to that drug store. He made his prescriptions call for as large an amount as he dared. If the amount desired was, as he thought, too large, he gave two prescriptions to the same person, sometimes using two names, he himself suggesting the names and addresses to be used. His prescriptions were filled at the drug store without question, even when prescriptions in two names were presented at the same time by one man. His charges were not according to the usual practice of professional men, but according to the amount of the drug prescribed. He charged invariably $1 for each dram, or one-eighth of an ounce, prescribed. The facts as to the sales for which he was convicted are as follows:

Counts 2 and 3 were based on sales to Joe Lewis, alias Henry McKnight. Lewis lived in Toledo, Ohio, was a traveling man, and an addict to the morphine habit. On March 25, 1917, he went to the office of Dr. Moy, whom he had not previously known, and told him that he was an addict and wanted to be fixed up. Dr. Moy examined his eyes, tested his chest, and looked over his body, and wrote a prescription for 8 drams, or 480 grains, and said, "Make this do you three weeks or longer," and charged $8 for the prescription, which was immediately filled at the drug store named above. This prescription was issued in the name of Henry McKnight, 48 Sibley Street, Detroit, Mich. On the 28th of April, following, Lewis returned to the doctor's office. The

doctor asked him if he had been there before and, upon being told that he had, asked his name, and was told that it was Henry McKnight, 48 Sibley Street, Detroit, Mich. The doctor looked at his records and said: "You got eight bottles the 25th of March," and started to write a prescription for eight bottles. After some argument, in which the doctor started to say that he was using too much, he was given a prescription for 12 bottles, the doctor saying: "Make this last you 30 days or longer. You are using too much; I can't be giving you so much." The charge for this prescription was $12. (Rec., pp. 81–84.)

The fourth, fifth, sixth, and seventh counts charge sales to John Capello, alias Harry Lyman. Capello lived in Pittsburgh and went to the office of Dr. Moy, to whom he was unknown, on March 30, 1917, giving the name of Harry Lyman. He told the doctor he wanted to get some morphine. The doctor asked who sent him and he replied a friend from Cleveland. No examination whatever was made. Capello asked for 20 bottles, or drams, and was given a prescription for 12 and charged $12 and told to go to the drug store mentioned above, where the prescription was promptly filled. In asking for this prescription Capello said he wanted it for his wife, who was sick. He returned to the doctor's office on April 6, and asked for a prescription for 16 bottles, or drams. The doctor asked him where his wife was and was told she was sick, and gave him the prescription for the 16

bottles, which was filled at the same drug store. He returned on April 16 and asked for 16 bottles, or drams, and was given a prescription for that amount and charged $16, no examination being made and no questions asked. He came back on May 8 and got a prescription for 14 bottles or drams, without examination, questions, or instructions. All of these prescriptions were filled at the same drug store. On the last visit in April, Capello had asked for 24 bottles. The doctor said he could not let him have that much and the best he could do was to let him have 16 bottles. After some urging the doctor said he would see what he could do, and, after looking through his desk, wrote another prescription for eight drams in a name which the witness did not recall. The result was that Capello received one prescription for 16 drams in his own name and another for 8 drams in a fictitious name and was charged $24. He presented the two prescriptions at the drug store at the same time. Both were filled and the morphine delivered to him. (Rec., pp. 85–90.)

The remaining counts on which there were convictions are the tenth and eleventh, charging sales to John Henry. The two sales charged in these counts were on April 6 and April 27, but they are only two of a number of prescriptions issued to this man within a short time. Henry's real name was John A. Frew. He first went to Dr. Moy's office on March 14, 1917; gave the name of John Henry and said he lived in Cleveland, Ohio; was using about

8 grains of morphine a day and wanted a prescription for all he could get. The doctor looked at his eyes and at his arm, where he had been using morphine hypodermically, and wrote two prescriptions—one was in the name of John Henry for 10 drams and the other in the name of Helen Henry, which name he had given as that of his wife, for 6 drams. The John Henry prescription gave the address as 113 Smithfield Street, Pittsburgh. The doctor said he could not put this address on the wife's prescription because she was not in the city, and her address was accordingly given as 1562 Curtis Avenue, Cleveland, Ohio. Frew had stated that he was a stranger in the city and did not know any city address and was not stopping at any hotel. The doctor said: "Well, I will make this out 113 Smithfield, and that's a hotel, and say you stopped there last night." Upon being asked where the prescription could be filled the doctor referred to the drug store mentioned above. Frew suggested that he telephone the store and give directions, but the doctor replied: "Oh, never mind; we do business together; we understand each other." Sixteen dollars was charged for the two prescriptions; both were presented at the drug store at the same time and filled. The witness says he used some of it and gave some of it away. Shortly afterwards Frew returned to Pittsburgh, but Dr. Moy was away. He called at the drug store and was referred to another doctor, who gave him a prescription. On March 22 he returned and

obtained from Dr. Moy two other prescriptions, one in the name of John Henry for 7 drams and the other in the name of Helen Henry for 7 drams, and these were filled at the same drug store. On April 6 he returned and obtained from Dr. Moy two prescriptions for 8 drams each, one for Helen Henry and one for John Henry. The John Henry prescription gave a Pittsburgh address. Upon presenting these prescriptions at the drug store he was told that they would not fill any more under a Pittsburgh address; that they were taking too big a chance, and that he "must go back to the Chinaman and tell him" this. He returned to Dr. Moy and reported what had been told him at the drug store. The doctor then took the two prescriptions and instead wrote one for 16 drams with a Cleveland address. This is the sale charged in count 10. On April 27 he returned and received from Dr. Moy a prescription for 12 drams for John Henry, 1723 Curtis Avenue, Cleveland, Ohio. He presented this at the drug store, together with one written by Dr. Webber to John Craig, 9712 Jenny Lind Street, McKeesport, Pa., for 4 drams, and one by Dr. Trader to Frank Keith, 2223 Jenny Lind Street, McKeesport, Pa., for 4 drams, and all three were filled at the same time. (Rec., pp. 55–64.)

PROCEEDINGS IN THE COURT BELOW.

The defendant interposed a motion to quash the indictment, upon the grounds that the Harrison Anti-narcotic Act was unconstitutional, and that the indictment did not charge the defendant with the com-

mission of any offense against the United States. (Rec., pp. 23–24.) The motion was overruled. (Rec., pp. 24–26.) After the conviction there was a motion in arrest of judgment upon substantially the same grounds, and this was likewise overruled. (Rec., pp. 166–171.)

PRESENT CONTENTIONS OF THE PLAINTIFF IN ERROR.

In the original brief filed in this court plaintiff in error's right to a reversal is based alone upon the alleged unconstitutionality of the Harrison Antinarcotic Act.

In a supplemental brief filed later, however, it is insisted that the indictment does not charge an offense under the Harrison Act. The point made is that the indictment only charges the dispensing of a prescription, and that this does not constitute a barter or sale of morphine within the meaning of section 2 of the Harrison Act.

BRIEF.

I.

The Harrison Act is constitutional.

All of the objections now made to the constitutionality of section 2 of the Harrison Act were urged upon this court in the case of *United States* v. *Doremus*, 249 U. S. 86, and, after thorough consideration, the court held that section not subject to constitutional objections. This question is therefore foreclosed, and it is not deemed necessary to make any reply to the brief in so far as it challenges the constitutionality of the act upon which the indictment is based.

II.

The facts above set out constitute a violation of section 2 of the Harrison Act, for which the plaintiff in error may be prosecuted as a principal.

It is true that section 2 of the Harrison Act condemns the unauthorized sale, barter, exchange, or gift of morphine. It is insisted that the giving of a prescription upon which morphine may be obtained is not a sale, barter, exchange, or gift of the morphine itself, and therefore not within the terms of the act. The giving of a prescription, however, is one of the means by which the sale of drugs is ordinarily accomplished. The plaintiff in error was a physician, with authority to prescribe morphine, but his authority was expressly limited to dispensing or prescribing such drugs for "a patient" and only in the course of his professional practice. Obviously, he had no authority to give a prescription to anyone unless that one was, in fact, his patient, and not then unless the morphine was prescribed, in good faith, in the course of his professional practice—that is, for the purpose of effecting a cure or giving relief.

In this case it can not be insisted, for a moment, that any one of the persons to whom these prescriptions were issued was a patient of Dr. Moy. He had never seen any of them until they came to his office and asked for morphine. There was no pretense of any request that he should treat them. It was usually simply represented that they were addicts and wanted morphine. When he examined them at all it was most superficially and apparently

only to verify their statements that they were addicts. The amount that he prescribed was not determined by his own judgment as to what was necessary to effect a cure, but by what the applicant desired or, at most, was in the habit of using. He gave no instructions as to the use or directions for a gradual decrease in the amount to be taken. There is not a shadow of ground for saying that he exercised any professional supervision over any of these persons, or was in the slightest degree interested in whether they were cured or even desired to be cured of the habit. He simply provided a source from which all who desired could obtain as much morphine as they desired. The prescriptions which he gave, therefore, were clearly not within the protection of the exception to section 2, which has been quoted above. The sole question is whether, for the part he played in the transactions by which these persons obtained morphine, he was guilty of selling, bartering, exchanging, or giving away morphine. He did not, of course, give away any, for he collected $1 for each dram of morphine that he prescribed.

The provisions of the law with respect to selling drugs of this kind are very strict. In order to engage in any kind of unlawful sales, with any hope of getting by, it is necessary to adopt some form which will have the semblance of compliance with the statute. The most available means for this purpose will naturally be found to be the loose and reckless giving of prescriptions by physicians. Under this method the sale is accomplished by the act of the physician in

writing the prescription and the act of the druggist in filling it. There is no doubt in this case that, as the result of the thousands of prescriptions written by Dr. Moy and filled by the druggist, immense quantities of morphine have been sold to persons not entitled to buy it under the law. These sales were unlawful. They were accomplished by the action of the doctor and the druggist. It may be said that the doctor did not own any morphine to sell, but that all that was sold belonged to the druggist. The doctor's prescription, however, was just as effective to the accomplishment of the sale as the act of the druggist's clerk in filling the prescription and in delivering the drugs, and he had no more interest than the doctor in the morphine itself. The total amount which the customer paid was divided between the doctor and the druggist. For every dram sold at the drug store the doctor received $1 when he wrote the prescription. The sale of the morphine was, in fact, not made by the druggist alone, but by the druggist and the physician acting together. They both participated in the sale and also in the profits. No more skill or labor was involved in writing a prescription for 16 drams than for 1 dram, yet this doctor charged $16 for the one and $1 for the other. He was not, in fact, engaged professionally as a physician in writing prescriptions for patients, but was engaged, with the druggist, in making indiscriminate and unlawful sales of morphine. He not only based his charges on the amount of morphine prescribed, but gave prescriptions to a man for a wife whom he had never seen,

and who, in fact, did not exist. When necessary, he himself suggested fictitious names and addresses to be used on the prescription. Unlawful sales have undoubtedly been made. Dr. Moy participated in them, because without his prescription no druggist could furnish the morphine and hope to escape punishment. Whether it be said that he made these sales or merely aided and abetted the druggist in making them, he is equally guilty under section 2 of the Harrison Act.

Section 332 of the Criminal Code of the United States is as follows:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

It can not be denied that Dr. Moy, by issuing his prescriptions, substantially aided and abetted the druggist in making these sales. It is certain that, through his prescriptions, he induced or procured the druggist to make the sales, and thus violated the law. It will be seen that the section of the Criminal Code above puts one who directly commits a criminal act in exactly the same category with one who procures the crime to be committed. No one can deny upon this record that Dr. Moy did procure unlawful sales of morphine to be made.

That such "prescriptions" as Dr. Moy issued were not prescriptions within the saving clause of section 2 was conclusively determined in *Webb* v. *United*

States, 249 U. S. 96. In that case the practice of the doctor in issuing prescriptions was identical with that of Dr. Moy in this case. The Circuit Court of Appeals certified to this court certain questions (p. 99), one of which was:

> 3. If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of section 2?

In reply the court said:

> As to question three—to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required. That question should be answered in the negative.

In that case, the doctor and the physician were charged with a conspiracy to violate section 2. In this case the indictment, in connection with section 332 of the Criminal Code, charges the doctor with selling or, what is the same thing, aiding or procuring the druggist to sell morphine through the issuance of "prescriptions" which were not prescriptions within the meaning of the law.

III.

The indictment substantially charges the offense denounced by section 2 of the Harrison Act.

We have seen that the conduct of Dr. Moy made him clearly guilty of an offense under section 2 of the Harrison Act. It is insisted, however, that the indictment does not charge him with such an offense. The point made is that, taking each count of the indictment as a whole, it merely charges him with issuing prescriptions not in the course of his professional practice and to persons not his patients and that this alone is not made an offense under the act in question. It may be doubted whether the proposition is sound in any sense. Perhaps it may be said that the mere issuing of a prescription which is not filled would not support a conviction. But if a physician unlawfully issues a prescription and that prescription is filled, he has undoubtedly procured the crime denounced by the statute to be committed, and, as shown above, is guilty. In the indictment in this case it is specifically alleged that the plaintiff in error unlawfully, willfully, knowingly, and feloniously sold, bartered, exchanged, gave away, dispensed, and distributed morphine. His connection with such sale or barter is then stated by showing that he issued prescriptions. The necessary implication, of course, is that the prescriptions were filled. Otherwise, there would have been no sale of the morphine. A fair construction of the indictment then is a charge that the sales complained of

were made upon prescriptions issued by plaintiff in error. Under section 332 of the Criminal Code, above quoted, an indictment charging a defendant with making an unlawful sale may be supported by evidence showing that he aided or abetted or procured the sale to be made. It is not necessary in an indictment to distinguish between one who directly makes the sale and one who procures it to be made. Proof that either has been done will support the indictment.

It is conceded that if the indictment in this case had stopped with the charge that "Jin Fuey Moy did unlawfully, willfully, knowingly, and feloniously sell, barter, exchange, give away, dispense, and distribute to John Henry 16 drams of morphine sulphate" it would have been a good indictment. It is equally clear, from what has been said above, that a conviction on such an indictment would be properly supported by evidence that while, not making the sale himself, Dr. Moy had procured it to be made. In such a case, upon the trial, it would have been a good defense, of course, to show that while the doctor procured the morphine to be sold he did so by issuing a prescription in good faith to a patient whom he was treating. It would perhaps have been better practice to have left this question to be brought into the case as a matter of defense. But the draftsman of the indictment, in order to give the defendant specific notice of what he was charged with doing, and also to negative any possible claim that his act was within the exception to the statute,

added to the allegation above quoted, to wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense to the said John Henry a certain prescription, "a copy of which is as follows."

And following the copy of the prescription it was averred that John Henry was not a patient of Dr. Moy and the prescription was not given in the course of his professional practice. It is now said that the addition of these unnecessary averments destroys the indictment and leaves the plaintiff in error charged only with the single act of writing a prescription. The answer is that, as above shown, this very act, in conjunction with the sale and delivery of the morphine by the druggist, makes the physician guilty of a violation of section 2. The indictment, therefore, by way of surplusage, contains nothing more than a statement of the facts, which, if proven, without being averred in the indictment, would justify a conviction, and this is exactly what was proven on the trial.

The identical question was before the Circuit Court of Appeals for the Fourth Circuit in *Foreman* v. *United States*, 255 Fed. 621, 622. The indictment in that case charged that the defendant did—

> unlawfully and feloniously dispense, distribute, and sell to one Elsie Davis a certain quantity of a certain derivative of opium, to wit, 3 grains of morphine sulphate, he, the said Walter T. Foreman, then and there issuing to the said Elsie Davis a certain prescription wherein he, the said Walter T. Foreman, pre-

> scribed for the said Elsie Davis 3 grains of morphine sulphate—

and that the prescription was not issued in the course of professional practice only, or in pursuance of a written order on blanks issued by the Commissioner of Internal Revenue for that purpose. It will be seen that there is no substantial difference between this indictment and the one now under consideration. It was there objected that section 2 does not prohibit the dispensing and distributing but only the bartering, selling, etc., of morphine, and that hence the giving of a prescription was not a violation of the act. The court held, however, that the charge was properly made that the defendant had sold and that this charge was not negatived by the additional and, perhaps, unnecessary words "dispense" and "distribute," and said (p. 623.):

> But the charge in the indictment of selling without the order required is a charge of one of the precise acts denounced in the statute. The dependent clause "issuing to the said Elsie Davis a certain prescription and," etc., does not affect the matter, for proof of a sale without the order would be sufficient, even if made under the guise of a prescription. The defendant was therefore informed by the indictment that he was charged with selling to the persons named. Whether proof that the defendant had made a sale in some other way than under the guise of a physician's prescription would have been fatal variance between the charge and the proof is a question which does not affect the validity of the indictment.

So, in this case, the effect of an averment in an indictment of facts with respect to the prescription upon which the morphine was sold serves the purpose of identifying the particular transaction upon which the prosecution is based, and the only effect is to limit the charge to that transaction. If it had been attempted, under the general charge of unlawfully selling, to convict the plaintiff in error for another sale than that specified, there might have been a fatal variance. In the case just referred to, after holding the indictment good, the court reversed the judgment upon the ground that the evidence did not sustain the charge, saying (p. 624):

> The drugs were not furnished by the defendant. On the contrary, the prescriptions were carried by the recipients to different registered druggists and by them filled. There was no evidence that defendant was interested in the business of any of the druggists, or had any arrangement to share the profits of the sales with them, or that he was agent for any druggist, or that he even knew where the prescriptions were to be carried. What the statute forbids is sale, barter, exchange, or gift, including such distribution and dispensing by a physician not in the course of his practice as would amount to participation in a sale, barter, exchange, or gift. The mere issuance of a prescription by a physician to be filled by any druggist, without participation by the physician in the sale made under it, would not be a sale as charged in the indict-

> ment, or such distribution or dispensing as amounts to a sale.

It may well be doubted if this does not go further than the law requires. In view of the section of the Criminal Code quoted above, it is difficult to see how a physician unlawfully issuing a prescription for morphine, intending, of course, that it shall be filled by any druggist to whom it is presented, does not in every case participate in the sale which is actually made and thus becomes a direct offender under section 2. But the present case makes the plaintiff in error guilty under the rule above announced. His prescriptions were filled by the thousand at a particular drug store. He directed at least some of those to whom the prescriptions involved in this prosecution were given to that drug store. He stated that they did business together and understood each other. He charged so much per dram for the morphine prescribed and, in a most substantial sense, participated in the making of unlawful sales.

The question of the sufficiency of the indictment was well disposed of by Judge Thomson in overruling the motion to quash in this case as follows:

> As it was not necessary in this case for the pleader to negative the exception, is there anything in the subsequent words of the indictment that destroy the legal effect of the previous words wherein the charge is specifically and legally made? * * *.
>
> The offense under section 2 is to sell, barter, exchange, or give away any of the pre-

scribed drugs, except in pursuance of an order on the designated order form. The registered physician may successfully defend on the ground that he "did not dispense or distribute" the drug in question, except to a patient in the course of his professional practice only. But this is a defense which must be set up by the physician, in order to escape the general requirements prescribed in section 2. The words in which exception "a" are negatived in the indictment must be read in the light of the words in which the offense is charged under the general provisions of section 2. It is alleged under the videlicet that the defendant "did unlawfully, willfully, knowingly, and feloniously sell, barter, exchange, and give away," with the additional words "dispense and distribute," to Feigel the drug in question. This is followed by giving the manner of the disposition of the drugs by the issuing to Feigel of the prescription therein set forth. To this there can be but one meaning; that is, that the drugs were disposed of by means of the prescription. Then follow words which take the physician out of the exception, namely, that Feigel was not a patient of the physician, and the morphine sulphate was dispensed and distributed by the physician not in the course of his professional practice only. It can not be complained that the words "dispensed and distributed" are not used in the enacting clause of section 2. In order to escape the effect of the words "sell, barter, exchange, or give away" used in the enacting clause of section 2, the physician must show that the drugs so dis-

> posed of were dispensed or distributed by him to a patient in the course of his professional practice. (Record pp. 25–6.)

It is respectfully submitted that the facts averred in the indictment, if proven, would justify a conviction under section 2 of the act and that the indictment was therefore sufficient.

IV.

The entire record shows conclusively that plaintiff in error was guilty; the indictment gave him full and specific notice of the offenses with which he was charged; the objection now made to it is highly technical and does not affect the substantial rights of the party.

The act of February 26, 1919 (40 Stat., sess. III, c. 48, p. 1181), amending section 269 of the Judicial Code, provides that:

> On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

If I am correct in the contention that the issuance and sale of these certificates makes the doctor issuing them guilty as a principal of the crime of unlawfully selling morphine, then an examination of the entire record can not leave the least possible doubt that Dr. Moy was guilty and should be convicted. The

present objection to the indictment and the defect in it, if any, are highly technical. It can not be claimed that Dr. Moy did not have full notice of the exact charge that was made against him and for which he was being tried. Indeed, the contention is that the indictment gave him fuller notice than was necessary, since it is conceded that it would have been a good indictment if it had omitted all reference to the prescription. He has, therefore, had a fair trial, with knowledge from the beginning of the precise complaint that was made against him. He does not dispute the facts and his guilt is beyond question. This is, in fact, exactly the kind of record upon which the statute quoted above forbids a reversal upon such technical ground.

V.

The assignments of error, complaining of rulings in the admission and exclusion of evidence and instructions to the jury given and refused, present no sufficient ground for reversal.

There are a number of assignments of error complaining of rulings made by the judge. Nearly all of these, however, in the last analysis, are based on the misconception that what Dr. Moy did was to issue prescriptions and that this could not, under any circumstances, render him guilty of a violation of section 2. Assuming that this construction of the law has been shown to be unsound, the rulings of the trial judge were entirely proper.

In the third assignment of error, error is assigned because, although at the request of the plaintiff in error, the trial judge instructed the jury that the statute does not limit the amount of morphine which a physician may prescribe, nor the amount of money which he may charge for his prescription, he added that the evidence touching these matters might be considered as throwing light on the question whether the drugs were, in fact, administered by the physician in good faith in the course of his professional practice only and to a patient. The ninth error complains of the admission of the evidence to which this instruction was applicable. Since the case turned, at last, on the point whether these prescriptions were given by a doctor in the course of his professional practice to a patient or merely for the purpose of selling or procuring the sale of morphine, this evidence was clearly competent and the instruction given proper.

The fourth assignment, in effect, complains because the court declined to instruct the jury that before they could convict it must be shown that Dr. Moy himself actually sold or gave the morphine, and that the giving of the prescription would not, in any event, make him guilty.

The fifth and seventh assignments complain because the trial judge refused to give an instruction to the effect that if Dr. Moy before writing the prescription examined each patient and gave instructions as to how to use the morphine, believing that it would be used by the patient, there could be no conviction,

and instead gave a modified instruction in line with what was said by this court in *Webb* v. *United States*, *supra*.

The sixth and eighth assignments merely complain of instructions which construed the statute as it is contended by the argument in this brief it should be construed.

The tenth assignment complains because the court refused to permit the wife of the plaintiff in error to testify as a witness for him. It is apparently conceded that if she had been offered as a witness to "prove his innocence" she would have been properly excluded as a witness. But it is said that her testimony as offered related only to a collateral matter; that she was offered to contradict the testimony of one of the witnesses that the doctor gave him a prescription in the name of his wife when his wife was not present at the office. No authority is cited to sustain this distinction, and it is believed none can be cited. If the wife is disqualified as a witness in a criminal case, she is disqualified without regard to the matters to which her testimony relates. Moreover, no substantial prejudice was done the plaintiff in error, even if this ruling was erroneous. The circumstances proven and not disputed would make him equally guilty whether she was absent or present when the prescription was given. Besides, this testimony related to only one or two of the counts in the indictment, while he was convicted on eight counts. The punishment imposed was not more

than the court could have properly imposed upon a conviction on one count.

CONCLUSION.

It is respectfully submitted that this is a correct and righteous judgment and that there is no sufficient ground for reversing it.

WILLIAM L. FRIERSON,
Solicitor General.

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phine in violation of the Anti-Narcotic Act by issuing a prescription, the clause as to issuing the prescription, being intimately involved in the description of the offense, cannot be treated as surplusage, but it is not repugnant to the charge of selling, since under the act one person may take a principal part in a prohibited sale of morphine belonging to another by issuing a prescription for it, in view of Crim. Code, § 332, making whoever aids, abets, counsels, commands, induces or procures the commission of an offense a principal. P. 192.

3. Subdivision (a) of § 2 of the Anti-Narcotic Act, in allowing the dispensing or distribution of narcotic drugs "to a patient" by a registered physician "in the course of his professional practice only," confines the immunity strictly within the appropriate bounds of a physician's professional practice, not permitting sales to dealers or distributions intended to satisfy the appetites or cravings of persons addicted to the use of such drugs. P. 194.

4. In a criminal prosecution in the District Court in Pennsylvania, the defendant's wife is not competent to testify for her husband, either generally or by contradicting testimony that certain matters transpired in her presence. P. 195.

253 Fed. Rep. 213, affirmed.

THE case is stated in the opinion.

Mr. H. Ralph Burton, with whom *Mr. Blaine Mallan* was on the briefs, for plaintiff in error.

The Solicitor General for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

Plaintiff in error was indicted and convicted for violating § 2 of an Act of Congress approved December 17, 1914, commonly known as the Harrison Anti-Narcotic Act (38 Stat. 785, c. 1).[1] His motion in arrest of judgment having

[1] SEC. 2. That it shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. . . . Nothing contained in this section shall apply—

(a) To the dispensing or distribution of any of the aforesaid drugs

been overruled (253 Fed. Rep. 213), he brought the case here by direct writ of error under § 238, Judicial Code, upon the ground of the unconstitutionality of the act. Afterwards this question was set at rest by our decision in *United States* v. *Doremus*, 249 U. S. 86, sustaining the act; but our jurisdiction continues for the purpose of disposing of other questions raised in the record. *Brolan* v. *United States*, 236 U. S. 216; *Pierce* v. *United States*, 252 U. S. 239.

These questions relate to the sufficiency of the indictment, the adequacy of the evidence to warrant a conviction, the admissibility of certain evidence offered by defendant and rejected by the trial court, and the instructions given and refused to be given to the jury.

The indictment contained twenty counts, differing only in matters of detail. Defendant was convicted upon eight counts, acquitted upon the others. Each count averred that on a date specified, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, and within the jurisdiction of the court, defendant was a practicing physician, and did unlawfully, willfully, knowingly, and feloniously sell, barter, exchange, and give away certain derivatives and salts of opium, to-wit, a specified quantity of morphine sulphate, to a person named, not in pursuance of a written order from such person on a form issued in blank for that purpose by the

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to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only: *Provided*, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist or veterinary surgeon shall personally attend; . . .

(*b*) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this Act: . . .

Commissioner of Internal Revenue under the provisions of § 2 of the act, "in manner following, to-wit, that the said Jin Fuey Moy, at the time and place aforesaid, did issue and dispense" to the person named a certain prescription of which a copy was set forth, and that said person "was not then and there a patient of the said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only; contrary to the form of the Act of Congress," etc.

It is objected that the act of selling or giving away a drug and the act of issuing a prescription are so essentially different that to allege that defendant sold the drug by issuing a prescription for it amounts to a contradiction of terms, and the repugnance renders the indictment fatally defective. The Government suggests that the clause as to issuing the prescription may be rejected as surplusage; but we are inclined to think it enters so intimately into the description of the offense intended to be charged that it cannot be eliminated, and that unless defendant could "sell," in a criminal sense, by issuing a prescription, the indictment is bad. If "selling" must be confined to a parting with one's own property there might be difficulty. But by § 332 of the Criminal Code, "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." Taking this together with the clauses quoted from § 2 of the Anti-Narcotic Act, it is easy to see, and the evidence in this case demonstrates, that one may take a principal part in a prohibited sale of an opium derivative belonging to another person by unlawfully issuing a prescription to the would-be purchaser. Hence there is no necessary repugnance between prescribing and selling, and the indictment must be sustained.

The evidence shows that defendant was a practicing

physician in Pittsburgh, registered under the act so as to be allowed to dispense or distribute opium and its derivatives without a written order in official form, "in the course of his professional practice only"; that he was in the habit of issuing prescriptions for morphine sulphate without such written order and not in the ordinary course of professional practice; that he issued them to persons not his patients and not previously known to him, professed morphine users, for the mere purpose, as the jury might find, of enabling such persons to continue the use of the drug, or to sell it to others; in some cases he made a superficial physical examination, in others none at all; his prescriptions called for large quantities of morphine—8 to 16 drams at a time—to be used "as directed," while the directions left the recipient free to use the drug virtually as he pleased. His charges were not according to the usual practice of medical men, but according to the amount of the drug prescribed, being invariably one dollar per dram. All the prescriptions were filled at a single drug store in Pittsburgh, the recipients being sent there by defendant for the purpose; and persons inquiring at that drug store for morphine were sent to defendant for a prescription. The circumstances strongly tended to show coöperation between defendant and the proprietors of the drug store. At and about the dates specified in the indictment—the spring of the year 1917—and for more than two years before, the number of prescriptions issued by defendant and filled at this drug store ran into the hundreds each month, all calling for morphine sulphate or morphine tablets in large quantities. In one case a witness who had procured from defendant two prescriptions—one in his own name for 10 drams, the other in the name of a fictitious wife for 6 drams—and had been directed by defendant to the specified drug store in order to have them filled, asked defendant to confirm the prescriptions by telephone so there would be no trouble; to which defendant replied:

"Oh, never mind; we do business together; we understand each other." On another occasion the same witness, having received from defendant two prescriptions for 8 drams each, one in his own name, the other in the name of the supposed wife, stating in one case a Cleveland address, in the other a Pittsburgh address, presented them at the drug store to be filled, and was told by the manager that he would not fill any more prescriptions under a Pittsburgh address; "they were taking too big a chance, and I must go back to the Chinaman and tell him what he told me, and he would understand—the Chinaman would understand." Witness returned the two prescriptions to defendant, told him what the manager had said, and defendant retained those prescriptions and issued to the witness a new one for 16 drams in place of them, with which the witness returned to the drug store and procured the specified quantity of the drug.

In each case where defendant was found guilty the evidence fully warranted the jury in finding that he aided, abetted, and procured a sale of morphine sulphate without written order upon a blank form issued by the Commissioner of Internal Revenue; and that he did this by means of a prescription issued not to a patient and not in the course of his professional practice, contrary to the prohibition of § 2 of the act. Manifestly the phrases "to a patient" and "in the course of his professional practice only" are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A "prescription" issued for either of the latter purposes protects neither the physician who issues it nor the dealer who knowingly accepts and fills it. *Webb* v. *United States*, 249 U. S. 96.

Errors assigned to the instructions given and refused to be given by the trial judge to the jury are disposed of by what we have said.

But a single point remains—hardly requiring mention—the refusal to permit defendant's wife to testify in his behalf. It is conceded that she was not a competent witness for all purposes, a wife's evidence not having been admissible at the time of the first Judiciary Act, and the relaxation of the rule in this regard by § 858, Rev. Stats., being confined to civil actions. *Logan* v. *United States*, 144 U. S. 263, 299–302; *Hendrix* v. *United States*, 219 U. S. 79, 91. But, it is said, the general rule does not apply to exclude the wife's evidence in the present case because she was offered not "in behalf of her husband," that is, not to prove his innocence, but simply to contradict the testimony of particular witnesses for the Government who had testified to certain matters as having transpired in her presence. The distinction is without substance. The rule that excludes a wife from testifying for her husband is based upon her interest in the event, and applies irrespective of the kind of testimony she might give.

The judgment under review is

Affirmed.

JIN FUEY MOY *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 44. Argued October 11, 1920.—Decided December 6, 1920.

1. In a case properly here on a constitutional question under Jud. Code, § 238, the court retains its jurisdiction to decide other questions presented, after the constitutional question has been settled in another case. P. 191.
2. In an indictment charging defendant with unlawfully selling mor-